SUPREME COURT OF THE UNITED STATES.

No. ~~157~~. 70.

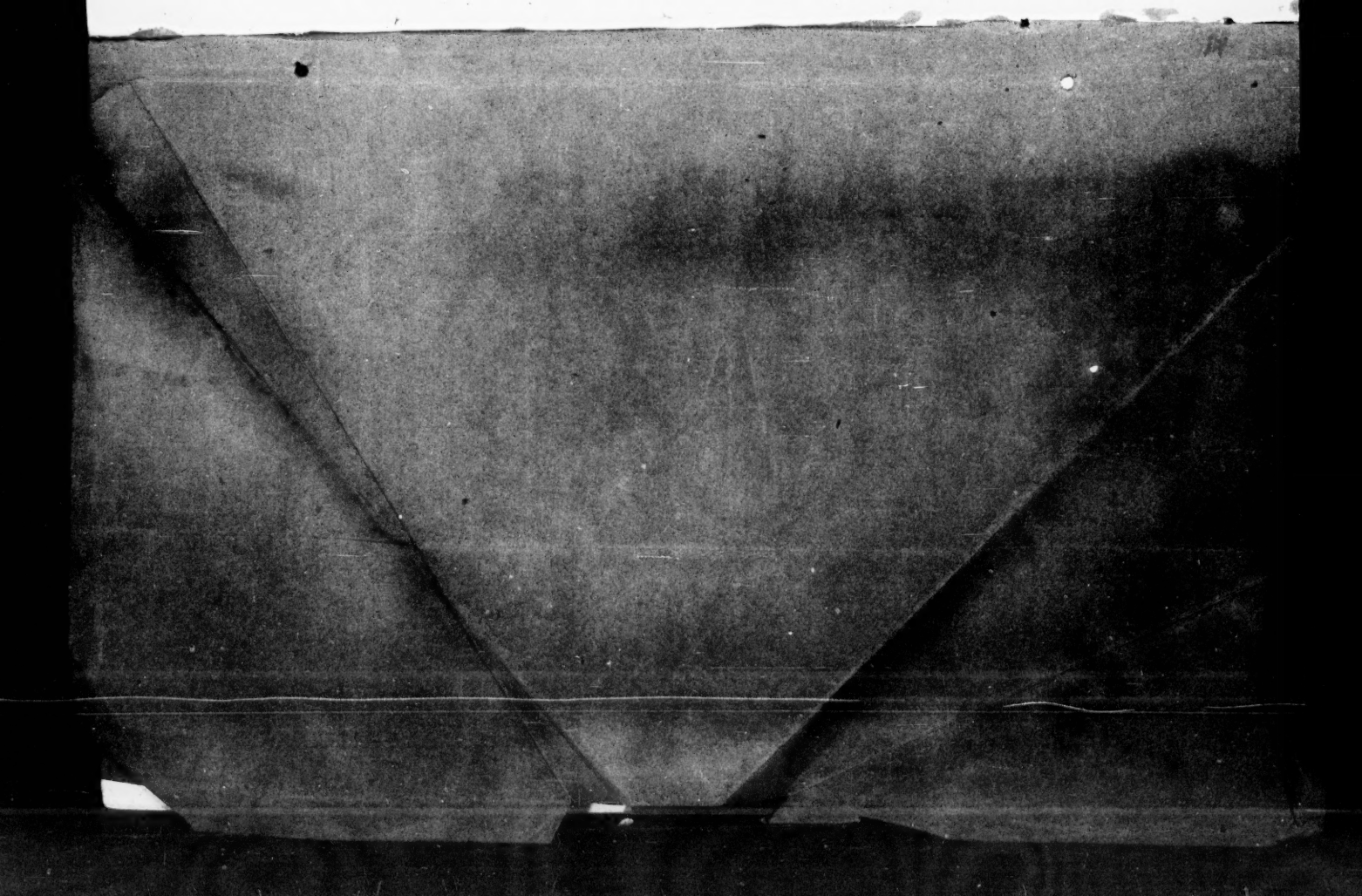
JOHN P. INGLE, EXECUTOR OF ANN R. DERMOTT, DECEASED, PLAINTIFF IN ERROR,

vs.

ZEPHENIAH JONES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

GOVERNMENT PRINTING OFFICE.



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No. 177.

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1 UNITED STATES OF AMERICA:

The President of the United States to the judges of the circuit court of the District of Columbia, sitting for the county of Washington, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, wherein Zepheniah Jones is plaintiff, and John P. Ingle, executor of Ann R. Dermott, is defendant, a manifest error hath happened to the great damage of the said defendant, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December, next, in said Supreme Court, to be then and there held; and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right, and according to the laws and customs of the United States, should be done.

Witness the Hon. Roger B. Taney, chief justice of said Supreme Court.

Issued the 8th day of March, 1862.

JNO. A. SMITH, *Clk.*

True copy. Test:

JNO. A. SMITH, *Clk.*

2 DISTRICT OF COLUMBIA, *to wit:*

The United States of America to Zepheniah Jones, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, on the first Monday in December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the District of Columbia, for the county of Washington, wherein John P. Ingle, executor of Ann R. Dermott is plaintiff in error, and you are defendant in error, to shew cause, if any there be, why judgment rendered against the said John P. Ingle, ex'or as aforesaid, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Hon. James Dunlop, chief justice of the circuit court of the District of Columbia, this eighth day of March, 1862.

JAMES DUNLOP.

Service acknowledged.

J. M. CARLISLE,
For defendant in error.

29 Nov., 1862.

3 Know all men by these presents that we, John P. Ingle and Joseph Ingle are held and firmly bound unto Zepheniah Jones in the full and just sum of five hundred dollars, lawful money, to which payment, well and truly to be made and done, we bind ourselves, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 7th day of March, 1862.

Whereas, lately, at a circuit court of the District of Columbia, sitting for the county of Washington, in a suit pending in the said court, wherein the said Zepheniah Jones was plaintiff, and John P. Ingle, executor of Ann R. Dermott, was defendant, judgment was rendered against the said defendant; and he having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation, directed to the said Zepheniah Jones, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next.

Now, the condition of the above obligation is such, that if the said John P. Ingle, executor as aforesaid, shall prosecute his writ to
4 effect and answer all damages and costs, if he fails to make his plea good, then the above obligation to be null and void, otherwise to be and remain in full force and virtue in law.

JOHN P. INGLE, [SEAL.]
JOS. INGLE. [SEAL.]

Signed, sealed, and delivered in the presence of—
C. B. BAKER.

Approved.

JAS. DUNLOP.

5 *Style of court.*

DISTRICT OF COLUMBIA, *to wit:*

At a circuit court of the District of Columbia begun and held in and for the county of Washington, at the city of Washington, on the third Monday of January, being the twentieth day of the same month, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-sixth.

Present: James Dunlop, chief judge; the Hon. James S. Morsell, and Wm. M. Merrick, assistant judges; Ward H. Lamon, esq'r, marshal; John A. Smith, clerk.

In the records of the proceedings of said court, among others are the following, to wit:

Parties.

ZEPHENIAH JONES
against
JOHN P. INGLE, ex'or of Ann R. Dermott.

6 Be remembered that heretofore, to wit, at the January term, eighteen hundred and sixty of this court, the plaintiff,

by Joseph H. Bradley and James M. Carlisle, esquires, his attorneys, filed in court here the following mandate:

Mandate.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the District of Columbia, greeting:

Whereas, lately, in the circuit court of the United States for the District of Columbia, before you or some of you, in a cause between Zepheniah Jones, plaintiff and Ann R. Dermott, defendant, the judgment of the said circuit court was in the following words, viz:

"Therefore it is considered by the court here that the said plaintiff recover against the said defendant, as well the sum of five thousand dollars, lawful money, with interest from 1st Dec'r, 1858, his damages aforesaid, by the jurors aforesaid, in form aforesaid, assessed by reason of the premises set forth in the *the* first count of his declaration, as also the several sums of money, his damages aforesaid, by the inquisitions aforesaid, in form aforesaid found; and also the sum of two hundred and one dollars and sixty cents, by the court, no where adjudged unto the said plaintiff for his costs and charges by him about his suit in this behalf expended; and the said defendant in
mercy, &c.," as by the inspection of the transcript of the
7 record of the said circuit court, which was brought into the
Supreme Court of the United States, by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and fifty-nine, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs; and that the said defendant, Ann R. Dermott, recover against the said plaintiff, Zepheniah Jones, twenty dollars for her costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court, for further proceedings to be had therein, in conformity to the opinion of this court.

FEB. 20*th*.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity to the opinion and judgment of this court, as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the honorable Roger B. Taney, chief justice of said
8 Supreme Court, the first Monday of December, in the year of
our Lord one thousand eight hundred and fifty-nine.

Costs of defendant.

Clerk, paid by pl'ff.
Attorney, $20
$20 taxed by W'm Tho's Carroll, clerk of the Supreme Court of the United States.

And the said Ann R. Dermott, being called, appears in court here by Robert J. Brent, esquire, her attorney; and thereupon by order of the court, on motion of the parties, by their said attorneys, the papers in the original suit are brought forward and filed in this cause; and it is further ordered that the said plaintiff have leave to file an amended or new declaration; and thereupon the said plaintiff, by his attorneys aforesaid, declared against the said defendant in the plea aforesaid, in form following, to wit:

Amended war.

WASHINGTON COUNTY, *sct.*

Ann R. Dermott, late of the county aforesaid, was summoned to answer unto Zepheniah Jones, in a plea of debt.

And thereupon the said pl'ff, by Jos. H. Bradley, s'r, and Carlisle Maury, his attorneys, complains.

For that whereas heretofore, to wit, on the first day of July, in the year one thousand eight hundred and fifty-two, at the county aforesaid, the said defendant was indebted unto him, the said
9 plaintiff, in the sum of twenty-five thousand dollars for the price and value of certain work and labor done and performed, and certain materials furnished by him to her, the said defendant, at her special instance and request, and which work and labor and materials were used and employed by her, and about the erection of certain buildings for her, the said defendant, at the county aforesaid.

And in a like sum of money for so much money paid, laid out, and expended by the said plaintiff, for the use of the said defendant, at her special instance and request. And in another like sum of money for so much money by the said defendant had, and received to the use of the pl'ff, which said several sums of money were to be paid by her, the said defendant, to him, the said plaintiff, when she, the said defendant, should be thereunto requested.

Whereby and by reasons of the said several sums of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff to demand and have of the said defendant the said sums of money above demanded.

Yet the said defendant, although often thereto requested, to wit, on the day and year aforesaid, at the county aforesaid, and often afterwards, hath not paid the said sums of money, or any part thereof, but the same, or any part thereof, hath hitherto refused and still doth refuse to the damage of the pl'ff $40,000, and therefore he
10 brings suit.

BRADLEY & CARLISLE & MAURY,
For Pl'ff.

Rule, plea, and imparlance.

And the said plaintiff, by his attorneys aforesaid, prays that the said defendant may answer to the declaration of him, the said plaintiff, in the plea aforesaid, or judgment by the court will be rendered against her in default thereof. Thereupon the defendant, by her attorney aforesaid, defends the force and injury when and so forth, and prays leave of the court here to imparle until the first Monday of May next, and then to answer to the declaration aforesaid of the said plaintiff, in the plea aforesaid; and to her it is granted. The same day is given to the said plaintiff then and there and so forth.

May term, 1860.

At which mentioned first Monday of May, in the year one thousand eight hundred and sixty, come again into the circuit court here, as well the said plaintiff, by his attorneys aforesaid, as the said defendant, by her attorney aforesaid; and the said plaintiff, by his attorney aforesaid, file in court here, in said case, the following bill of particulars:

Bill of particulars.

Miss Ann R. Dermott to Z. Jones, Dr.

For the following estimate of work and material furnished in the erection of the Avenue House and the warehouse attached, situated on the land cornering on Market Space and 7th street west, square No. 432, in the city of Washington, made from actual measurements and surveys, to wit:

To 1,498 cubic yards of excavation, made for cellar vaults, basements, stores, and foundation trenches, at 25c	$374 50
223½ perches of blue rock, foundation walls, at 350c.	782 25
$603\frac{958}{1000}$ brick, all hard, furnished and laid, at 13 dols	7,839 75
252 feet sup'l of frieze to front cornice, of 1½ projection, at 10c	25 20
175 feet lin'l of full moulded brick cornice, of two fronts at 150c	262 50
2 cast-iron ornamental leffeits, at the angles of cornices, at 200c	6 00
102 ft. lin'l of plain brick cornice, of 2 projections, at 12c	12 24
28 ft. lin'l coping to 9″ fence and parapet walls, at 12½	2 50
80 ft. lin'l walls, cut up under slate, and 2 course slanting, at 12c	9 60
$40\frac{350}{1000}$ brick, allowed for half openings, work only, at 3 50	141 22
14 suspension trimmer arches and material, at 2 75.	38 50
157½ feet lin'l, of 2″ X ½″ wrought iron, curved bars, [illegible]c	42 52

To 27 common trimmer arches, including the material, at 1 25	33 75
42 hearths laid, including the material, at 1 25	52 50
42 fireplaces, cased, at 1 00, 42 00, 62 jack arches, at 75c., 46 50c	88 50
12 North river stone door sills, set, at 50c	6 00
9 door sills of granite, set, at 75c., 6 75; 4 do., large size, at 1 00, 4 00	10 75
114 stone window sills, set, at 50c., 57 00; 3 do. to side light windows, at 1 00, 3 00	60 00
356$\frac{2}{9}$ yards of brick paving to street fronts and areas, &c., at 70c.	249 35½
190 feet lin'l of brick gutter, formed in pavement, at 4c	7 60
63 sup'l feet of gutter laid in cement, laid under kitchen floor, at 12c	7 56
817$\frac{2}{9}$ sup'l feet of stone pavements, laid in cellars, alley, &c., at 55c	449 78
64 plain marble heads, furnished for front window, at 4 50c	288 00
64 do., from 2 to fifth story window, set in place, at 50c	32 00
59 marble window sills, furnished for fronts, at 400c.	236 00
41 granite window sills, furnished for bas't and rear window, at 2 40c	98 40
14 second-hand free stone, do., rear window, at 1 50c	21 00
2 granite door sills, 4.7 in. X 12″ X 8″ and 8 71c. each	17 42
	$11,195 40
12 To amount brought forward	$11,195 40
To 2 granite door sills, 5′ 0″ X 15″ X 8″ at 11\frac{65}{100}$	23 30
To 1 granite door sill, 3′ 4″ X 12″ X 8″, at	8 15
" 88$\frac{1}{3}$ lin'l of door sills of store fronts, 16″ wide, 8″ thick, dressed and set complete, at 2\frac{31}{100}$	204 05
" 71$\frac{7}{12}$ feet lin'l of granite, 6″ X 8″, water table, at 1 00c	71 58
" 8 granite door sills to privies, 2′ 9″ X 10″ X 6″, at $4	32 00
" 2 granite platforms, 6′ 4″ X 6′ 3″ X 8″, at 62\frac{31}{100}$	124 62
" 1 " " 6′ 0″ X 6′ 3″ X 8″, at $50	50 00
" 2 " " 6′ 6″ X 6′ 3″ X 8″, at 63\frac{85}{100}$	127 70
" 1 " " under front steps, 7′ 6″ X 6′ 1″ X 8″, made in two pieces	64 22
" 145¾ ft. lin'l of coping to area wall, 12″ X 8″, at 2 00c	291 50
" 12 ft. sup. sinking on top of end copings for spout, stones, at 50c	6 00

To 188 ft. lin'l of 6″ curb stone, furnishe dand set, at 1 00c	188	00
" this amount for granite work for the front entrance, steps prepared according to please, and specification, and partly set, but prevented from completing of, as by *Miss Dermott's own order*	125	00
" 6⅓ feet of marble sill for front entrance, 17″ X 8,″ at $4¼	26	56
" 2 marble plinths rebated and fitted to end of sills, at $4	8	00
" 44¼ feet lin'o of North river stone door sills furnished, at 30c	13	27½
" 25 sup'o jambs and lining, to coal slide in alley, at 60c	15	00
" For the following estimate of carpenters' work, including the materials of every description, hauling and painting and glazing, viz;		
" 20 windows of fifth story, double box frames, ⅝ blinds, and inside trimmings, and painting and glazing complete, at $31 39/100	627	80
" 1 do., same description, on stories with circular trimmings	32	39
" 1 false frame, with blinds complete	11	12
" 2 windows of 12 light, 10″ X 12″, with blinds, &c., complete, at $20 16/100	40	32
" 18 windows, of 12″ 12″ X 16, of fourth story, complete, at $37 36/100	672	84
" 3 windows, of 12″ X 16, of fourth, over warehouse, at $31 57	94	71
" 5 windows back of warehouse, without blinds, at $17 91	89	55
" 18 windows of 12 lights, 12″ X 18″, third story, complete, at $43 67	786	06
" 1 do., false frame, with blinds	15	24
	14,944	38½

13	To amount brought forward	$14,944	38½
	To 1 false frame with blind of 4th story	13	18
To 3 front windows of warehouse 3d story at $35 00/100		105	00
" 5 back windows " " " at $21 20/100		106	00
" 12 windows of the second story of 15 lights 12 X 20 at $63 15/100		707	80
" 3 windows front of warehouse, same size, at $46 38/100		139	14
" 1 false window with blinds at		20	80
" 15 hoods over second story, 15 light windows at 175		26	25
" 5 back windows 2d story of 12 lights, 12 X 20 complete at $50 25/100		251	25
" 3 sets of inside shutts to 15 light windows, complete at $36 62/100		109	86

To 5 windows in rear of warehouse with shutters, 12 lights, 12 X 18 sashes $33 90	169	50
1 window at kitchen stairs of 12 light 10 X 16, complete, at	18	82
4 windows of 1st story 12 lights 12 X 18 complete, at $33 90	135	60
2 windows, solid frames, 12 lights, 9 X 12, complete at $20 00	40	00
9 windows, solid frames, 12 lights, 12 X 12, with shutters, &c., complete, at $23 67	213	03
1 window of 12 lights, 9½ X 16, folding sash, on stairs at skylight	13	29
2 windows, solid frames of 12 lights, 10 X 12 in warehouse front cellar without shutters at $7 44	14	88
2 windows to back cellar with sash and iron bars at $12	24	00
67 feet sup. of skylight sash, glazing and painting over the main staircase at 20c. pr. ft.	13	40
23 ft. of grooved and tongue skylight frame at 12c.	2	76
166 ft. of dressed grooved and tongue and splayed lining to do. at 13c.	21	58
45 lights of 12 X 18 glass and glazing to skylight at 40c	18	00
33⅓ yards of 3 coat painting to do. at 22c	7	33
181⅓ feet sup. of skylight for use of middle store, including glass, glazing, and painting at 47c	85	30
4 doors of warehouse, front, complete, at $57 96½	231	86
2 rear doors of warehouse, complete, at $40 97½	81	95
2 doors in the rear of avenue stores with inside trimmings, complete, at $41 90	83	80
3 large doors of east store front of Ave. House at $67 18	201	54
south store fronts, embracing the three stores, and including every expense except the iron cols and iron girder over do	397	44
	18,847	74½
Amount brought forward	$18,847	74½
To 956 feet of ⅞ board partition in stores at 9c.	86	04
To 80 feet of ceiling strips at 6c., 480c., 182⅔ yards painting of do. 3c., 622c	40	11
2 doors and frames complete to front cellar of warehouse at $9 44	18	88
1 folding sash door with portable shutters in bas't store at	36	89½
3 panel doors with frames complete in stores and kitchen at $14 73	44	19
2 sash doors and jambs leading to space under skylight	29	46
3 small panel doors and frames leading from the kitchen into the vault under the office at $9 2[illegible]	27	[illegible]

To 1 battened door and jambs leading to back cellar	6 50
" 3 doors and frames to vaults under south pave't at $6 50	19 50
" 45 ft. sup. jamb caseings to the two openings in the wall between back and front rooms of kitchen at 20c.	9 00
" 1 panel door, frame and transom, at the landing of the kitchen steps directly on the alley at	21 88½
" 1 do. do. do. leading to balcony over alley at	26 13½
" jambs, archatrave, pilasters, consoles, cornice, pediment, and lintel of front entrance	90 83
" 3 rises of steps ascending to vestibule door at 3 42½c.	10 27½
" 1 vestibule door and trimmings, complete	117 18
" 1 panel door, frame, transom, and trimmings under main staircase, complete, at	24 31
" 3 sets of folding and sliding doors 12′ 4″ X 10′ 0″ of the principal story with brass rails and sheeves, complete, 138 $\frac{2\,0}{1\,0\,0}$	414 60
" 4 panel doors of principal story 7′ 4″ X 3′ 2″ with $\frac{8}{4}$ opened and rebated jambs 14″ wide trimmed with $\frac{6}{4}$ opened pilaster and full entablature, grained, and furnished with white mineral knobs and silvered garnature, 45 $\frac{7\,9}{1\,0\,0}$	183 08
" 8 panel doors same description with 6″ jambs at 41 $\frac{3\,8}{1\,0\,0}$	331 04
" 2 folding doors of closets at end of dining room $\frac{6}{4}$ thick, single moulded and trimmed as above, one side at $28 $\frac{9\,7}{1\,0\,0}$	57 94
" 29½ feet sup. $\frac{6}{4}$ shelving in said closets at 16½c	4 87½
" 79 " " $\frac{4}{4}$ " " " at 12c	9 48
" 4 x 12 N. C. posts and lintels under the iron girder across the entrance passage under the division wall, together with the jambs, pilasters, crown moulds, and base blocks, and painting, complete, at	34 77
To 4 doors of 3d story, $\frac{8}{4}$ thick, double moulded, $\frac{8}{4}$″ 14 jambs, with transom sash, trimmed with plain pilasters, beaded grounds, dental crown mould, mortice lock, as above, at $37 28	149 12
To 8 doors of the same description, with 6″ jambs, at $32 63	261 04
" 1 set of sliding and folding doors of 3d story, 12′ 0″ X 9′ 0″	101 43
" 1 set of folding doors, 11′ 9″ X 10′ 2″ of " at	94 45
" 4 doors of 4th story, 14″ jambs and transom, $\frac{8}{4}$″ thick, double moulded, trimmed with beaded grounds, plain pilasters, crown moulds, mortice locks, with dark mineral knobs and bronze garnature, 31 $\frac{9\,0}{1\,0\,0}$	127 60
" 1 panel door, with 14″ jambs, at end of the passage and leading to water-closets, no transom	27 56

To 8 doors with transoms, as above, with 6″ jambs, at $27 $\frac{84}{100}$	222	72
" 4 doors of 5th story, 14″ jambs, transoms, &c., as above, $31 $\frac{62}{100}$	126	48
" 12 doors of 5th story, 6″ jambs, transoms, &c., as above, at $27 $\frac{84}{100}$	344	08
" 2 doors of 5th story, 6″ jambs, without transoms, at $24 $\frac{45}{100}$	48	90
" 1 panel door with frame, sill, transom, sash, and trimmings one side, leading into roof, at	24	26
" 3,204 ft. sup'l all heart N. C. floor and sleepers, laid in the base't of Avenue House, at 10 $\frac{65}{100}$ per square	341	54
" 28,530 feet sup'l of N. C. joists, part 3″ X 12″, part $2\frac{1}{2}$″ X 12 and spaced, part 14″ from centre, and part 15″, and averaged from 1 to 5 stories elevated, at 8 95 p'r square	2,553	43
" 27,365 feet of $\frac{7}{8}$ inch N. C. floor, laid at 8 25	2,257	61
" 1,092 feet sup'l of 3″ X 12″ N. C. joists, under the roof of the rear portion of the warehouse, 5th floor, at 8 95	97	73
" 5,358 feet lin'l of 3 X 12 N. C., extra joist under partitions and to the trimmers, at 11¼c. per ft.	602	77
" 208 feet lin'l of double framed trimmer, 30c.	62	40
" 1,338 feet lin'l double street bracing to joists, at 9c.	120	42
" 5,251½ feet sup'l of 2½″ X 6″ N. C., ceiling joists, at 5⅛c	269	11
" 1,213 feet of 3″ X 4″ close sheathed roof over wall house, at 8c	97	04
16 To 4,656 feet of double pitch main roof rafters, 3″ X 6″ N. C. spaced 15″ from centres and close sheathed, at 10c	465	60
To 1,111 feet sup'l of hip and valley roofing, at 11 dols.	122	21
" 140 " " framed and trussed gallows to support part of the main roof over warehouse, at 15c	21	00
" 12 f't lin'l of 1¼″ bolts and nutts to do. at 50c	6	00
" 290 f't sup'l of framed and braced wall under the west eave of the roof over warehouse, at 19c.	55	10
" 290 f't sup'l ¾ close sheathing to warehouse, 4¼c	12	32½
" 4 straps and bolts to do. at 1 50	6	00
" 71 f't lin'l of rough verge board, at 4c.	2	85
" 1,626 tin roofing and covering of framed wall, at 9c.	146	34
" 994 $\frac{10}{12}$ f't ¾ slat flooring over tin roof and sleepers, at 5½	54	72
" 120 f't lin'l dressed and cornered 5 X 5 N. C. posts on roof, at 17c.	20	40
" 13 pins for clothes lines put through posts, at 6c.	1	80
" 202 ft. lin'l of ¾ slat rails nailed round posts, at 8c.	16	16
" 6,300⅝ ft. Susquehana gagued slating, at 9d.	567	06
" 87 ft sup'l of copper valley gutters, at 40c	34	80

To 99 " lin'l of " flashings, at 26c 25 74
" 154 ft. lin'l of 2" X 7" dressed and painted snow fenders, at 18¾c 28 87
" 75 ft. lin'l of 2 X 5 dressed and painted snow fenders, at 17c 12 75
" 50 wrought iron knees furnished and put on for snow fenders, at 30c 15 00
" 170 ft. lin'l of large moulded eave gutter, at 30c.. 51 00
" 134½ ft. lin'l, of large plain back " at 20c.. 26 87
" 392 " " 4" down spouting, at 20c..... 78 40
" 4 cistern heads, at 2 00, 8 00; 3 cast iron leaders, at 2 50, 7 50 ..... 15 50
" 116 yards of two coat painting to spouts and gutters, at 16c 18 56
" 198⅞ yards of four coat painting to front brick cornice, at 37c 73 45
" 9,906 yards sup'l of common 3" X 4" partitions, at 2 38/100c. 235 76
" 3,768½ " " trussed, " " at 3c. 113 05
" 437 " " circular studding to staircase, at 5c. 21 85
" 424 " lin'l of ¼ square edge skirting of bas't, at 11c..... 46 64
" 321 " " moulded edge do. 7" wide of stores, at 14c 44 94
" 614¼ " " opened and moulded do. 12" wide of parlor story, at 28c. 171 92
17 To 779 yards of plain moulded do 11", of 3d story, at 25c 194 75
" 1948 8/12 " " " 10", of 4th & 5th story, at 24c 467 68
" 150 joist holes, cut in old west wall for joist, at 10c 15 00
" 89 rises of stairs of warehouse, averaging 3' 5", at 1 25 ..... 111 25
" 230 f't sup'l, of ⅝ dressed, tongued and grooved, and beaded boarding to the first flight of do, at 12c 27 60
" 1 buttoned door, formed in do, hinged and bolted, 1 40
" 112 f't of square newell to stairs, and pine handrail, at 10c 9 70
" 2 staircases, of avenue stores, of 13 rises each, with mahogany handrail, turned ballusters, facias, nosing, turned newells, painting and varnishing 167 04
" 100 rises of private stairs leading from kitchen to the 5th story, with mahogany handrail, plain pine ballusters, turned maple newells, boxed skirtings, and painting of do., $3 47/100 ..... 347 00
" 299¼ f't of sup'l ⅝ dressed tongued and grooved boarding, to do. 10c 29 92½
" 64 rises of geometrical staircase of 3' 6" step and 3 f't cylinder, with mahogany handrail, turned and moulded oak ballusters, opened and moulded box

skirtings, plain bracketts, ornamented facias and nosings, including painting and varnishing, at $9¼ 592 00

To 45 f't sup'l of circular face, paneled and moulded ⅝, spandrail under 1st story of stair, at 152c 68 40

" 36⅔ " " plain, paneled and moulded spandrail, at 43c 15 77

" 744 " " ⅝ dressed, tongued and grooved, and battened lining of dumb waiters, at 10c 74 40

" 7 7/12 " lin'l, of nosed and moulded cap to to top of do. at 12c 91

" 11 " sup'r folding battened door to top, at 15c. 1 65; 2 p'r butts, 30c. 60 2 25

" 3 folding ⅝ paneled and moulded doors to dumb waiter, including casings, hardware and painting, at 8 49 25 41

" 1 portable tray, at 2 31; iron frame, gearing and rope, 35 00 37 31

" 1 resorvoir suspended to the ceiling of 5th story, over the private stairway, made of dressed ⅝, 6′ 8″ x 4′ 6″ x 3′ 0″, including six ⅞ iron bolts and painting, but not the plumbing 27 27

18 To 1 do. to ceiling over ladies' water-closets, 10′ 00″ x 4′ 6″ x 3′ 0″ 40 30

To 714 f't of ⅝ dressed partition, forming passage to water-closet, including the painting of do. one side, 12⅘c 88 85

" 136 f't of floor and ceiling strip to partition, at 3c. 4 08

" 233 " ⅝ partition, dividing water-closets, dressed both sides and painted, 14⅘c. per f't 33 65⅗

" 4 water-closets and one slop-closet, fitted up with seats, rises, falls, skirting, doors, and painting 45 36⅗

" 4 windows to water-closets of 3 lights, 10″ x 12″, hinged sash and stationary mortice blinds, trimmings and painting, $7 37/100 29 48

" 8 panel doors and frames of yard privies, at $11 94/100 95 52

" 8 privies fitted up with seats, rises, floors, fall, boxes, and painting, and partitions and roofing, $11 08/100 88 64

" 2 frames and doors at the ends of privy boxes, $3 6 00

" 2 small ventullating windows to privies, 1 00 2 00

" 1 large double gateway, leading to the yard privies and back yard of warehouse, complete 18 43

" 125 f't sup'r close board fence, double face, with facias and base boards on both sides, and capped, 7½c 9 37½

" 231½ f't sup'l, of heart, N. N. flooring, and sleepers to the balcony leading to the 2d story privies, at 12c 27 78

" 8 wrought iron bars, 7′ 0″ x 2¼″ x ⅝″, furnished and

	spiked to the joist of warehouse to support said balcony, at $3 $\frac{2\,2}{1\,0\,6}$	25 76
To	444½ f't sup'l $\frac{8}{4}$ cut and thrust blind screen to do. at 31c	133 35
"	79 f't lin'l, of 1½" x 4", plain cap to screen, at 8c.	6 32
"	99 yards of 3-coat green painting to blind screen, at 50c	45 00
"	71½ f't sup'l of balcony floor, leading to roof of warehouse, at 15c	10 72½
"	5 wrought iron bars to support do. with bosses on do. at 4 50	22 50
"	74½ feet lin'l, of iron railing, with fancy cast iron ballusters and wrought rails, posts and braces to the above, at 2 30	56 35
"	19 yards of painting to the above, at 16c	2 04
"	343 f't sup'r of floor, ceiling, and sleepers of east and south balcony, including lumber and nutts, at 29¼c	100 33
"	94⅔ f't facia to do. at 13c, 1 23; 5½ f't of circular do. at 33c, 1 82	14 13
19	To 9 iron bars of wrought-iron, with bosses and bolts to do., at $4½	37 50
To	6 ornamental cast-iron bracketts under east balcony, $5	30 00
"	103½ feet, lin'l, of railing to the above balcony, with wrought-iron rail, posts, and braces, and cast fancy ballusters, at 2 30	238 05
"	131½ yards, 2-coat painting, to the above iron railing, bracketts and oiling of the floor, 16c	21 04
"	46 yards 3-coat painting to the ceiling and facia, at 22c	10 12
"	1 kitchen dresser, 7' 6" long, with closet, panel doors, under the 1st shelf, including the painting	16 48
"	1,093½ f't, lin'l, of $\frac{6}{4}$ rebated angle strips, at 8c.	87 48
"	1,187 f't, sup'l, battering to the 9" west wall, above dining room, 24c.	26 71
"	2 trap doors near reservoirs, at 200c.	4 00
"	1 wood mantle of Lefever pattern, boxed and painted.	10 00
"	10 wood mantles of 3d story, boxed and arched, friezed, $9	90 00
"	10 wood mantles of 4th story, boxed and arched, friezed, $8	80 00
"	14 wood mantles of 5th story boxed and arched, friezed, $5 50	77 00
"	6 feet gressett casing to entrance steps at east sto ceiling, 20c.	1 20
"	41 trimmer centers for hearths, at 60c.	24 60
"	112 feet, sup'l, of cast-iron posts to east store front of avenue stores, at 1 12½c. per f't.	126 00

To $35\frac{1}{3}$ f't, sup'l, of moulded and dentaled of cast-iron, to do., at 100c.		35 33
" $17\frac{2}{8}$ f't, lin'l, of 14″ cast-iron ribbed girder to do., at 2 50.		44 17
" $128\frac{10}{12}$ f't, sup'l, of cast-iron posts to front of warehouse, at 1 $12\frac{1}{2}$c.		144 10
" $48\frac{2}{5}$ f't, sup'l, of cast-iron cornice to do., at 100c.		48 67
" $23\frac{1}{5}$ f't, lin'l, of 14″ cast-iron ribbed girder to do., at 2 50c		58 33
" $45\frac{1}{2}$ f't, lin'l, of 14″ cast-iron ribbed to do. south front, at 2 50		113 75
" 40 f't, lin'l, of 9″ cast-iron ribbed girder, at skylight, at 250c		80 00
" 23 f't, lin'l, of 14″ cast-iron girder over the alley, under the front and division walls, at 2 50c.		57 50
" 17 f't, lin'l, 14″ do. over the main entrance in the division wall, and in division wall, 4th floor, at 2 50.		42 50
" $11\frac{1}{2}$ f't, lin'l, 9″ do. over the alley, under the 9″ west wall, at 200c		23 00
" $46\frac{2}{5}$ f't, lin'l, of cast-iron col., of 7″ diameter at skylight, at 1 $37\frac{1}{2}$		64 17
" $55\frac{2}{5}$ f't, lin'l, of cast-iron col., 8″ diameter, south front, at 1 $54\frac{1}{2}$		84 $97\frac{1}{2}$
20 To $70\frac{7}{9}$ yards 3-coat bronze green to iron works, at 23c.		23 36
To 5 cast-iron curbs, and covers to holes in vaults, at 2 50c.		12 50
" 302 sup'l feet of slate laid in foundations, at 8c		24 16
" 37 lin'l " of 9″ slate " at 6c		2 22
" 3 marble sills of large side-light windows, $8 50		25 50
" 2 side-light window trimmings, on the outside, not embraced heretofore in the estimate of windows having pilasters and full entablature, at $\$21\frac{48}{100}$		42 96
" 1 side-light window, outside trimmings of architrave and band moulding		8 90
" 3 new marble mantles, furnished and set in place		150 00
" 3 old marble mantles repaired and put up, $10		30 00
" 7 ornamental cast-iron window guards, at $4		28 00
" 5 cast iron window sills, at 100c		5 00
" $53\frac{1}{4}$ f't, sup'l, of wrought-iron gratings, covering the spaces over the front area of warehouse not taken up by the platforms, at 100c		53 25
" $132\frac{9}{12}$ f't, lin'l, of wrought-iron railing to the areas of the Avenue House, at $3		398 50
" $121\frac{5}{9}$ yards of painting to the above iron work, at 16c		19 45
" 3 new grates furnished and set to parlors, $20		60 00
" 2 old grates put up in " $5		10 00

To 48 bells, secret, hung in metalic tubes, at 7 dol's each	336 00
" this amount of plumber's work and material in lining with sheet lead, two reservoirs, four water-closets with traps and soil pipes, lead pipes conducting the water into the kitchen, third, fourth, and fifth stories, with cocks; kitchen sink, lead receivers and waste pipes, and cast-iron pipe sewer to connect with the sewer	449 20
" 737 yards of oiling and pencilling of brick fronts, at 25c	184 25
" 7,649 yards of plastering, 3-coat work, hard finish, at 28c	2,141 72
" 404⅓ yards of half open'gs, work only, at 14c	56 57
" 80 wall irons to tie walls to floors, at 50c	40 00
	$39,864 28

21 *Notice of Recoupement.*

And the defendant, by her attorney aforesaid, files in court here the following notice:

ZEPHANIAH JONES }
vs. }
ANN R. DERMOTT. }

To Zephaniah Jones, esq'r, the above plaintiff:

Take notice that on the trial of the above cause I will claim to discount or recoupe from any cause of action you may establish (if any such can be established) against me, the sums of money, damages and claims hereinafter stated, that is to say:

1st. The cost and expense incurred by me in repairing and reconstructing my building at the southeast croner of 7th street and Market space, in Washington city, which you undertook to construct and complete for me, as stipulated in our written contract dated the 22nd day of April, 1851, and which building by and through your omissions and default, became dilapidated, cracked, and damaged, before the same was completed and delivered over by you under said contract	$12,000 00
2d. To loss of rents for stores and warehouse not completed and delivered over by you on the 1st October, 1851, as stipulated on your part, in your written agreement with me aforesaid, for a long space of time, to wit, three years	$6,000 00
3rd. To loss of rent for hotel part of the building, hereinbefore referred to and described, and of warehouse in 2nd story of said part, and which were not	

22 completed and delivered over by you on the 1st

December, 1851, as stipulated on your part in your contract with me as aforesaid, for a long space of time, to wit, ——————— $4,466 66⅔

4th. Value of materials of old buildings used by you in construction of building referred to in aforesaid written contract $6,000 00

Total $28,466 66⅔

R. J. BRENT & J. C. BRENT,
For ANN R. DERMOTT, *the defendant.*

Non assumpsit.

And the said defendant, by her attorney aforesaid, as before, defends the force and injury, when, and so forth, and saith: that she did not assume upon herself in manner and form as the aforesaid plaintiff above against her hath declared, and of this she puts herself upon the country; and the said plaintiff, by his attorneys aforesaid, in like manner and so forth; therefore let a jury thereon appear before the court here on the third Monday of October next, by whom and so forth, and who, neither and so forth, to recognise and so forth, because as well and so forth; the same day is given to the aforesaid parties then and there and so forth.

OCTOBER TERM, 1860.

And now, to wit, the said third Monday of October, in the year of our Lord one thousand eight hundred and sixty, comes again into court here as well the said plaintiff by his attorneys aforesaid, and the said defendant doth not come; and the said plaintiff suggests to the
23 court here, that after the last continuance of the plea aforesaid, and before this day at the county aforesaid, the said defendant departed this life, and the same is not denied. Whereupon, on motion of the said plaintiff, by his attorneys, leave is given by the court to the said plaintiff according to the act of assembly in such case made and provided, to issue summons returnable to the next term of the court to John P. Ingle, the executor of the last will and testament of the said Ann R. Dermott, the defendant, to appear and defend in the plea aforesaid, and further process of and upon the premises aforesaid, by order of the court is continued until the third Monday of January next, and the same day is given to the said plaintiff then and there and so forth.

JAN'Y TERM, 1861.

And which said third Monday of January, in the year of our Lord one thousand eight hundred and sixty-one, comes again into court the said plaintiff, by his said attorneys; and now here also comes the said John P. Ingle, the executor as aforesaid, in pursuance of said summons by Robert J. Brent, esquire, his attorney, and brings into court here the letters testamentary, by which it appears to the court here

that he, the said John P. Ingle, is the executor of the said testament and last will, and have the execution thereof, &c. Whereupon, the said John P. Ingle, executor as aforesaid, by his said attorney, offers himself ready to defend the said plea in the premises aforesaid. And thereupon with the consent of the said parties by their attorneys, and by order of the court said cause is continued until the first Monday of May next.

24 MAY TERM, 1861.

At which said first Monday of May, in the year of our Lord one thousand eight hundred and sixty-one, comes again into court here as well the said plaintiff as the said defendant by their attorneys aforesaid. And thereupon with the consent of the said parties by their attorneys aforesaid, and by order of the court, the said cause is continued until the third Monday of October next.

OCTO. TERM, 1861.

And now, to wit, the said third Monday of October, in the year of our Lord one thousand eight hundred and sixty-one, come again into court here, as well the said plaintiff, by his attorneys aforesaid, as the said defendant by his attorneys aforesaid; and the said defendant by his attorney aforesaid, withdraws the plea of non-assumpsit, and comes and defends the wrong and injury when and so forth, and says that as executor aforesaid he does not, nor did the said Ann R. Dermott in her lifetime, owe the said sums of money above mentioned, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained and of this the said defendant puts himself upon the country, and the said plaintiff by his attorneys aforesaid doth the like. And thereupon for trying the issue aforesaid it is ordered by the court here, that twenty persons from the panel of petit jurors be drawn by ballot, according to the act of assembly in such case made and provided; and thereupon the twenty persons being so drawn by ballot and written upon two lists, one of which said lists is delivered to the counsel of the respective parties,
25 and the counsel for each of said parties having strucken out four persons from the said lists, thereupon the remaining twelve persons being called, come, to wit:

Jury.

1. William Van Riswick,
2. Eustace E. O'Brien,
3. Hanibal C. Addison,
4. Joseph M. Dorwing,
5. David Jackson,
6. Rezin Arnold,
7. Alexander Lammond,
8. William Cooper,
9. Henry Korn,
10. George W. Godey,
11. Benjamin H. Clements,
12. George Gray,

Verdict.

Who being empannelled and sworn to say the truth in the premises, upon their oath do say: that the said Ann R. Dermott, was in her life indebted to the said plaintiff in manner and form as the said

plaintiff hath in pleading above complained against her, and they ascertain and assess the damages of the plaintiff due by the intestate in her lifetime to be twenty-two thousand one hundred and forty-nine dollars with interest on twenty thousand one hundred and thirty-six dollars, from the fifth day of April, in the year eighteen hundred and fifty-two.

Judgment.

Therefore, it is considered by the court that the said plaintiff recover of the said defendant, as well, the said sum of $22,149 with interest on $20,136, from the 5th day of April, 1852, so as aforesaid found by a jury sworn in the premises, as the sum of $127 $\frac{12}{100}$, for his costs and charges by him, about his suit in this behalf, laid out and expended, to be levied of the proportion of the goods and chattles which were of the said Ann R. Dermott at the time of her death, and which are or have been in, or shall hereafter come to the
26 hands of the said defendant to be administered, and which may be subject to the said damages, costs and charges in a legal course of administration.

Referred to Auditor.

And because the amount of assets in the hands of the said defendant, and just claims against the deceased are unknown to the court here, therefore, William Redin, esquire, is appointed by the court here, auditor to ascertain the sum for which judgment shall be given to the said plaintiff in this behalf, and that the said auditor having regard to the amount of assets in the hands of the said defendant, and the debts due to other persons, shall make his report thereof to the court here, and said cause was by consent of the parties and by order of court continued until the third Monday of January next.

JANUARY TERM, 1862.

And now, to wit, the said third Monday of January, in the year of our Lord one thousand eight hundred and sixty-two, comes into court here the parties aforesaid, by their attorneys aforesaid, and the auditor, to whom the said case had been referred, makes his report to the court here in manner and form following, to wit:

Auditor's report.

ZEPHANIAH JONES, *ag't* JNO. T. INGLE, ex'or of Ann R. Dermott. } Judgment in circ't c't, D. C.

Reference to ascertain the proportion of assets to which the above judgment is entitled in the personal estate.

27 Dr. Inventory: Appraisement of furniture 247 52
" of 2 Calif'a bonds 940
" 2 Davenport, do 750
" 18 do 6,750
" 20 coupons of do 450

Rent collected of Carter, due in Miss Dermott's life		72 22
Do. of J. H. King " " "		150
Cash of C. Andrews		4 23
" for 2 Calif'a coupons		32 55
" 2 do		31 50
" 2 do		31 85
		$9,459 87
Cr. Loss on Davenport coupons	45	
Do. on sale of Calif'a bonds	180 67	
Do. on sale of doors, &c	2 65	
	228 32	
Allowances in full, advertising adms'n 2 25, appraisers 25c	2 50	
House rent	68 06	
Servant's wages	12	
Do	27	
Registers' fees	25 72	
For taking care of furniture	35	
Removing doors	1	
R. J. Brent's fee in Sup. Co't, Wallack's case	200	
Funeral expenses	209	
Car'd forw'd	$808 60	9,459 87
28 Bro't forward	808 60	9,459 87
Chancery testimony	111 84	
J. A. Smith's fees	43 04	
Same—Jones' case	11 70	
Marshal's fees, same case	15	
Carroll's, Wallach's case	58 10	
J. C. Brent in Jones's case in cir't co't	75	
R. J. Brent in do., $150 his fee, and $14 paid by him to witn's, and printing	164	
Def'ts witnesses in do.	31 25	
Plaintiff's costs in do.	127 12	
Executor's com'n on $1,731 95	173 19	
Auditor's fees	23 25	
		1,642 09
		$7,817 78
Which consists of the following on hand, viz: 2 Davenport bonds, not convertible at present	750	
18 do.	6,750	

And the furniture which has been delivered by the ex'or to the specific legatee, but which is liable with the other personality to the debts, and must be considered undisposed of and in the hands of the ex'or	242 52	
		7,742 52
Dr. Balance for distribution		$75 26
The debts Z. Jones, principal	$22,149	
Interest from April 5th, '52, to 1st Jan., '62	11,764 25	
	33,913 25	
Other debts as per list annexed	35,421 03	
Total	$69,334 28	

Of which those in said list marked I are secured by deeds of trust on the real estate of the intestate.

29 The eight bonds secured by deeds of trust to Rich'd Dement, of 31st Aug't, 1835, and 1st Jan., 1838, are not included in the list of debts. The possession of the bonds cancelled is evidence of the payment of the debts, although the deeds are not released. If any claim should be made for them, it would be the duty of the executor to plead limitations.

The balance in the executor's hands of the personal estate in cash, does not exceed $\$75\frac{26}{100}$, which is not sufficient to meet the legal expenses to which he will be liable in the two pending suits of Jones and Wallach.

I report, therefore, that there are no personal assets at present available to be applied to the above judgment of Z. Jones; but the executor has in his hands $\$127\frac{12}{100}$, to pay the plaintiff's costs (Jones) in that suit.

W. REDIN, *Auditor.*

31 Jan., 1862.

30 *Statement of claims against the estate of Anne R. Dermott, as presented to John P. Ingle, executor, with interest computed to 1st January,* 1862.

I. Catherine Smith, bond, balance of principal	2,300	
Interest from 8th July, 1860	204 12	
		2,504 12
I. Elizabeth Bolton, bond, principal	1,000	
Interest from 1st July, 1860	90	
ditto. note, principal	100	
Interest from 1st July, 1860	9	
		1,199
I. Bank of Metropolis, bond, principal	670 05	
Int. on $650, from 11 Nov'r., 1861	5 41	
		675 46

I. Neirnsee & Nielson, bond, principal		1,692 93	
Int. from 7th April, 1853	$886 65		
Less paid by A. R. D	400		
		486 65	
			2,179 58
I. Garlington & Simpson, So. Carolina bond		8,000	
Int. at 7 p. c't, from 26th March, 1860		987 77	
			8,987 77
I. Mary E. Wilmer, bond, principal		220	
Interest from 28th Jan'y, 1860		25 41	
ditto. bond, principal		255	
Interest from 28th Jan'y, 1860		29 44	
ditto. note, principal		125	
Interest from 28th Jan'y, 1860		14 43	
ditto. note, principal		864 45	
Interest from 29th Dec'r, 1859		54 02	
ditto. note, principal		581 46	
Int. from 29 Dec'r, 1859	$69 94		
Less paid by A. R. D	16		
		53 94	
			2,223 15
Am't carried forw'd			$17,769 08
31 Amount brought forw'd			$17,769 08
I. George W. Tubman, bond, principal	$3,000		
Interest from May 1, 1860		300	
ditto. bond, principal		1,430	
Interest from Jan'y 28, 1860		165 16	
ditto. note, principal		182 70	
Interest from May 1, 1860		18 30	
			5,096 16
I. Magruder D. Tubman, bond, principal	3,000		
Interest from 28th Jan'y, 1860		346 50	
I. ditto bond, principal	4,144 50		
Interest from 28th Jan'y, 1860		478 60	
			7,969 60
			$30,834 84
W. R. Riley & Bro. account		62 90	
Interest from 1st June, 1861		2 21	
			65 11
Doct. B. Washington, account		60	
Interest from Oct. 1, 1854		26 10	
			86 10
Doct. A. Y. P. Garnet, account		80 80	
Interest from Sept. 1, 1861		1 60	
			81 60

J. S. Harvey & Co. note, $100, & acc't, $64 88	164 88		
Interest	24 80		
			189 68
A. Noer & Sons' account	93 50		
Interest from Sept. 1, 1861	1 87		
			95 37
Daniel Dowd, account	13 04		
Interest from Sept. 1, 1861	26		
			13 30
George E. Kirk, acc't, (quere)			50 57
Samuel Kerby, account	41 25		
Interest from Jan'y 1, 1856	14 62		
			55 87
Harriet McCormick, note	55 48		
Interest from May 1, 1860	5 54		
			61 02
Amount carried forward		$31,533	46
32 Amount brought forw'd		$31,533	46
Joseph Fry, account	$6		
Interest from July 1, 1861	18		
			6 18
George A. Smith, account	12 50		
Interest from Aug't 1, 1853	6 31		
			18 81
Ann McMeehan, note	400		
Interest from June 5, 1850	111 67		
			511 67
Gales & Seaton, account	481 68		
Interest from 1 Jan'y, 1856	173 40		
			655 08
John C. Brent, account	548 66		
Interest from July 1, 1861	16 46		
			565 12
Thomas C. Daniel, account	1,500		
Interest from Sept. 1, 1861	30		
			1,530
Eglantine Coke, notes and acc't	168 10		
Interest from May 10, 1860	16 40		
			184 50
Samuel Bacon & Co. account	12 26		
Interest from Sept. 1, 1861	24		
			12 50
Doct. F. Dawes, account	234 75		
Interest from Jan'y 1, 1850	168 96		
			403 71
		$35,421	03

This statement exhibits the debts due by Anne R. Dermott at the time of her death, with interest thereon up to 1st Jan'y, 1862.

On all the debts *secured by deeds of trust*, and on some others, I have made payments, but such payments are not noticed in this statement.

JOHN P. INGLE, *Executor.*

Jan'y 21, 1862.

33 *Judg't on Auditor's report.*

Therefore it is considered by the court here, that the said plaintiff recover against the said defendant the said sum of one hundred and twenty-seven dollars and twelve cents, by the said auditor, so as aforesaid ascertained to be of the goods and chattels, rights and credits, which were of the said Ann R. Dermott, at the time of her death, and remaining to be administered in the hands of the said defendant, if so much thereof in his hands to be administered he hath, and if so much thereof he hath not, then to be levied of the proper goods and chattels of the said defendant. It is further considered by the court here, that the said plaintiff be entitled to such further sum as the court shall hereafter assess on discovery of further assets in the hands of the said defendant, and the said defendant in mercy and so forth.

Test, JNO. A. SMITH, *Cl'k.*

Mem.

Before the jury aforesaid retired from the bar of the court here, the said defendant, by her attorney aforesaid, filed in court here the following bills of exception, to wit:

Def'l's 1st exception.

JONES
vs.
INGLE, ex. of Dermott.

This cause being called for trial, and before the jury was
34 sworn in, or the issue joined, the court, on the motion of the plaintiff, having on the 14th Nov'r, 1861, overruled the motion heretofore filed by def't on the 8th May, 1860, at the same time ordered the def't to plead by 10 o'clock a. m., Friday, 15th Nov'r, 1860, to the amended nar, and thereupon the def't excepts, and this his bill of exceptions is signed and sealed this 14 day of Nov'r, 1861.

JAS. DUNLOP. [SEAL.]
JAS. S. MORSELL. [SEAL.]

To precede exception No. 1, *in Jones vs. Ingle ex'r of Dermott.*

And now, at this October term, 1861, of the said court, being the trial term of said cause, the said defendant, by his attorney aforesaid, moves the court to grant his said motion heretofore filed in this cause, to wit, on the 8th day of May, 1860, to strike out the said amended

nar, and the bill of particulars filed herein on the 2 April, 1860, and the court having heard the argument of counsel and duly considered the same denies the said motion.

And thereupon, on motion of said plaintiff, by his said attorneys, it is this 4th day of November, 1861, ordered by the court, that unless the defendant shall by ten o'clock to-morrow, file an issuable plea, or plea to the merits of said cause, the clerk of this court do enter herein judgment against the said defendant by default for
35 want of a plea, and that the plaintiff have leave to execute at the bar of this court an enquiry of damages in said cause.

14 Nov'r, 1861.

Defendant's 2d exception.

At the trial of this cause, and after the jury were sworn, the plaintiff gave in evidence by John C. Harkness, a competent witness, that he knows that the plaintiff executed the work and furnished the materials for the construction of a building erected at the northwest corner of 7th street and Market space, on lots numbered one and twelve, in square numbered 432, in the city of Washington, belonging to the late Ann R. Dermott; that the witness measured and valued the work so done and materials so furnished by the plaintiff, including the three stores and the warehouse, as well as the hotel part of said building.

And thereupon the plaintiff offered to give in evidence by said witness, his measurement and valuation of all the work done and materials furnished by the plaintiff in and about the said building, it being the measurement and valuation specified and described in the said amended bill of particulars, but the said defendant objected to said offered evidence, because as he insisted, the plaintiff is estopped by the election heretofore made and of record in this cause, from claiming in this action more than the value of the work done
36 and materials furnished in and about the three stores and warehouse described in said election of the plaintiff; and in making this objection, the defendant's counsel read to the court here the bill, answer and exhibits, filed in the equity case of Zephaniah Jones *vs.* Anne R. Dermott, which bill is still pending, and all of which bill, answer and exhibits, are made a part hereof, (copied on page —;) but the court overruled said objection, and allowed the said plaintiff to give in evidence the measurement and value of the whole work done and materials furnished by plaintiff in and about said building, and to the amount specified in said bill of particulars, and thereupon the defendant excepts this 15 November, 1861.

JAS. DUNLOP. [SEAL.]
JAS. S. MORSELL. [SEAL.]

Defendant's 3rd exception.

After the evidence stated in the aforegoing exception, made a part hereof, the plaintiff gave evidence, by John C. Harkness, to prove that he had measured the whole work described in the plaintiff's bill

of particulars, that the said work was done and the materials furnished by plaintiff, and stated in reply to a question by defendant, that said work was begun under a written contract between the plaintiff and def't's testatrix; and thereupon the defendant re-
37 quired that plaintiff should produce said written contract, or account for its absence before any further testimony should be given in support of the plaintiff's claim; but the court overruled said objection, and allowed the plaintiff to proceed with further proof by the same witness in support of his said claim, and thereupon the defendant excepts this 15 Nov., 1861.

JAS. DUNLOP. [SEAL.]
JAS. S. MORSELL. [SEAL.]

Defendant's 4th exception.

After the evidence stated in the aforegoing exception, made a part hereof, the plaintiff gave in evidence, by said Harkness, that he knows that the work charged in the bill of particulars was done by plaintiff and the materials furnished by him, and that the same was worth by the measurement rates, the sum of $39,864 28, and that the same was reasonably worth said amount in his judgment; and further, that said Anne R. Dermott occupied said buildings after said work was done.

And therefore the plaintiff rested his case.

The defendant then produced to the witness the written contract dated 22 April, 1851, made a part hereof, (copied in printed record page 43,) and proposed to ask the witness if he did not witness said contract, and which the witness stated was witnessed by him
38 and Gen. Jones. And thereupon the defendant proposed to ask the witness, and as part of his cross-examination, whether said written contract was not the contract under which said work was begun, and accompanied said enquiry with an offer to read said contract to the jury in case of an affirmative answer by witness, and to give evidence further to show that the work claimed in this suit was performed under said contract, but the court rejected said enquiry, and would not allow the same to be put on cross-examination of said witness, but required that the defendant should postpone said enquiry and offer the same as a part of his evidence in chief, to which ruling of the court and rejection of said enquiry, this 15 Nov., 1861.

JAS. DUNLOP. [SEAL.]
JAS. S. MORSELL. [SEAL.]

Defendant's 5th exception.

After the signing of the preceding exception, and made a part hereof, the def't offered to prove by said Harkness, and on his cross-examination, that the work as measured by him, as stated in his examination in chief, was done by the plaintiff according to the original plan and design under which said work was undertaken, except in a few immaterial alterations, the defendant proposing to follow

39 this offer up with proof to show that said work was done, so far as it was, pursuant to the original plan, under a special contract for an agreed price, and that said alterations did not increase the cost and trouble of the plaintiff to an amount exceeding $1,136, and can be clearly separated from the work done in pursuance of said original plan; but the court rejected said offered evidence on cross-examination, because the examination in chief by the plaintiff did not extend to any special contract for closing the work and furnishing the materials, for which the plaintiff claims compensation in this suit. And thereupon the defendant excepts this 18th Nov'r, 1861.

JAS. DUNLOP. [SEAL.]
JAS. S. MORSELL. [SEAL.]

Defendant's 6th exception.

After the evidence stated in the aforegoing exceptions made a part hereof, and after the said Harkness had been cross-examined in part and in reference to the work claimed by defendant to have been done under the written contract hereinafter read in evidence, the plaintiff further presented to said Harkness, certain drawings which he verified as made by himself to illustrate the plans and manner in which the plaintiff had constructed said building, and further gave in evi-
dence by said witness, that about a week after the 1st Octo.,
40 1851, the said Ann Dermott came to the witness and said she was highly gratified as there was so little settlement of the building and it had not settled as much as she expected, and she then begged him to use his influence with the plaintiff and get him to wait for the $5,000 payable on 1st Oct. 1851, as she was unable to raise the money. And the said Harkness testified on his cross-examination that he measured the plaintiff's work. as aforesaid, since the decision of this case in the Supreme Court, and he measured the work as done, and materials as furnished, by the plaintiff to the personal knowledge of the witness; that in said measurement he made no deduction for any portion of the plaintiff's work because it had to be taken down and reconstructed, nor has he any knowledge of any portion being so taken down and reconstructed by Mr. Nernsee, at the request of Miss Dermott; that the greatest settlement of the building constructed by plaintiff, was at the intersection of the south wall of the warehouse with the front wall on 7th street, that is to say, at the south-east corner of the warehouse; that the settlement here was in all about 8¼ inches, and to that point of greatest settlement, the said wall gradually declined from its western terminus—that there were cracks in the front wall on 7th street.

That when the work was first begun, the witness was of the opinion that the earth on which said building was to be erec-
41 ted was defective and insufficient to sustain such a weight as contemplated, but when the foundations were excavated and disclosed a stratum of yellow clay, there was much congratulation by Miss Dermott, witness, and the plaintiff, at the prospect of such a firm substratum of earth, and witness became satisfied that the

building would stand ; that when he expressed his original doubts to Miss Dermott she said she would rather not build if she had to underpin the walls ; that, in the judgment of the witness, said building would not have settled but for the act of Miss Dermott in insisting that the plaintiff should suspend two additional in the fifth story of the warehouse, and these chimneys were by her direction suspended on the south wall of said warehouse, and the same being thus overloaded, settled in the earth as before stated, and the witness is of the opinion that but for said additional weight, said wall would not have settled, but such overloading of that wall caused the crust of yellow clay earth to give away at the southeast corner of said warehouse; that the first of said two additional chimneys were suspended on the fifth story of said south wall, 4 feet west, and the second of said chimneys 38 feet west ; of the southeast corner of said warehouse, where the settlement was greatest ; that up to the time of said settlement both Jones & Miss Dermott, as well as the witness, believed
that the earth was stable and solid enough to support said
42 building, and if the earth had been solid and stable as supposed, it would easily have supported ten times the weight of these additional chimneys ; nor had witness any knowledge of the plaintiff being told that the substratum of earth beneath said yellow clay was marshy and unstable; that in the opinion of witness the said building had reached its final settlement at the depth of $8\frac{1}{4}$ inches as aforesaid, and would not have settled any further nor has it in fact settled more since it attained that point ; that the witness considered the said building fit for use and habitable when the plaintiff gave it up to Miss Dermott, although the front wall on 7th street was cracked and the south wall of warehouse had settled as aforesaid—that witness did then *plumb* the said south wall and found it perpendicular, but did not plumb the front wall on 7th street to see if it was out of perpendicular. At that time thought it in no danger of falling ; that after the excavation was made the witness informed Miss Dermott that his fears about the earthy foundations had disappeared, and jeered him for having had fears; that when the plaintiff gave up the said building it was all completed except work to be done to the amount of $334 25, which was proper to be done to com-
plete it but which was not done by plaintiff. And this was
43 the taking down and reconstruction of those parts which were defective by reason of the sinking of the foundations, in the opinion of said witness, that about 1 April, 1852, he went through and examined the house and found it in good condition ; it remained shut up until July, when witness saw men ripping up the floors and digging a well, but saw no water then lying about the foundations, nor was any water there when Jones left the work or prior thereto, that when Miss Dermott excused herself for not paying the $5,000 as stated in chief, the three stores and warehouse were not finished.

And the plaintiff then rested his case, and thereupon the defendant gave proof by J. W. Colley as follows : That he has been a carpenter and builder for more than 20 years, and has for many years resided in Baltimore ; that the best way to ascertain whether the earth foun-

dations are stable and adequate to the support of a building is to test them by the eye and by the use of a crow-bar before building; that he knows nothing of the usage in Washington, but in Baltimore it would be that if the contractor ascertains the substratum of earth to be defective he should inform the proprietor, who should then make a special contract, and such witness supposes to be the usage.

That witness was employed by Mr. Neirnsee in July, 1852, to come to Washington, and assist in repairing and reconstructing the building erected by plaintiff aforesaid; that the substratum of yellow
44 earth on which this building was erected was ascertained by us to be only six inches thick in places under the cellars, while in other places it was 10 feet thick; that with a view to the drainage of water we found in the foundations, we dug a well in one of the cellars under the stores, and at the depth of 35 feet struck a stream of pure water, which rose over the surface of the cellar, and was by us carried to the sewer, where it escaped; that beneath this yellow stratum of earth we found a soft blue or marsh mud, which in many places could have been detected by using a crow-bar in the excavations before building; that when the witness went there they found many defects in the building; that there was a down spout which discharged water through the arch under the alley into the cellar; that there was no *shoe* or elbow to the spout near the earth, and no dish stone, though there was a slab stone under the spout; that witness cannot say there ever was an elbow or shoe, or whether it had been knocked off, but for want of it and a dish stone, the water passing through the spout descended through the brick work of the arch and flowed into the cellar; that the earth about the south was miry and the kitchen cellar so wet that they had to place bricks to walk *upon* over the floor.

That he also saw defective workmanship in the building as
45 constructed; that the rafters on which the roof rested, at point where the wall settled, had no sufficient braces; that the stone wall in the cellar on which iron columns rested, was not properly *bound* together, and the iron columns resting on said wall without a proper capping on the wall or base for the columns to rest on, the pressure of the columns had split the stone *wall open.*

And that the stone wall on which the arches supporting the alley rested was also defectively bound together, and the same had opened; that Mr. Neirnsee, with a large force, went to work to repair and reconstruct the said building, which was wholly unfit for use and dangerous; that he took down a portion of the wall and relaid the stone foundations in part, by putting under them logs and flagging, and brick work on these logs, and then reconstructed the wall so taken down; and the same has stood ever since without further settlement.

That witness estimated the whole settlement or sinking of said south wall of the warehouse to be about two feet, as they could plainly see where it had been previously raised after a settlement the length of a brick; that the front wall on 7th street, over the alley, for the space of 27 feet, when the witness examined the building first in

July, 1852, was considerably out of plumb and in danger of falling into the street, and the mouth of the sewer being higher than
46 the cellars, the drainage was defective, as it must rise to the level of the sewer before it could escape. And the said Colley, being cross-examined, stated that he thinks Mr. Neirnsee made some changes in the plan of the building by fitting up the upper part of the warehouse for hotel purposes, but he cannot say to what extent; that said Neirnsee was engaged in and about the premises until December, 1852, when he handed over the house to Miss Dermott, fit for use and occupation, and in as good condition as possible under the circumstances.

And the defendant further gave in evidence, by Joseph Wantz, that he was a stonemason, and was employed by Mr. Neirnsee to assist in repairing and reconstructing said building, and that he lowered the mouth of the *sewer* into which the water *drained* from the *areas*, and that a portion of the area wall under the stone steps bulged out, and was repaired by him; and the said witness also gave evidence to show the same defects as those testified to by Colley. The witness Harkness, being again called by plaintiff, verified a drawing made by him to illustrate the extent and character of the $8\frac{1}{4}$ inches settlement proved by him, and also plans to show the system of drainage adopted by which all the water from every part of the building was carried to the mouth of a sewer, existing before the work was begun, and
47 to which Miss Dermott required the drainage to lead; and, on cross-examination, the said Harkness said that the work was done by plaintiff by plans or drawings, which were worn out by handling, and the drawings now produced were made by the witness, were intended to illustrate the work as done by the plaintiff according to the original plans and their modifications.

The defendant then resumed his evidence, and proved by said Harkness that he and Gen. W. Jones, now deceased, were the subscribing witnesses to the sealed contract, with specifications now shown to him and made a part hereof, (which it is agreed may be read from the printed record in the Supreme Court containing the same,) and that the drawings accompanying said contract were placed in the hands of the plaintiff, and the said building was begun according to the plan of said specifications and drawing, and was executed according to the same as altered or modified by the requirement of Miss Dermott.

The defendant further gave evidence, by Hiram J. King, to prove that he has been for several years a tenant of the hotel, part of said building, and that the roof has sunk and leaks from insufficient rafters to support the weight; that the windows all along 7th street work badly from the original settlement, and cracks in that wall; that the floors have settled from the washboard in many of the passages;
48 that the 7th street wall is still partially out of plumb, as can be seen over the front door; that the drainage was of no account, and we have, since this suit was brought, turned the water altogether from the area; that the marble heads of the window sills in the south and east fronts are cracked; that many of the chimneys smoke, and

the flues are too small to be swept; that water leaks through the ceiling of one of the stores fronting on the avenue.

And the defendant further gave evidence, by Edward Binnix, to prove that he was employed to do the plastering on said building under Ross, who was employed by the plaintiff and Walker, and when he went there a settlement had occurred at the alley on 7th street, and the ground was soft and miry at that place and in the cellar under the arch; and some of the water came through the arch in the alley, but he does not know if the water rose in the cellar or descended, though the wall above the ground was damp.

And the defendant further proved by W. J. Ross that he was employed by the plaintiff as plasterer and saw the miry foundations while the work was going on, and he considered the earth as marshy and springy when excavated for this building; also, that there was a slight settlement in the west wall of warehouse, but more
49 in the east wall, and it was in whole length of the alley.

And further gave evidence, by Mr. Harrover, that the down spouts put upon the building in question were too small, in his opinion, and became choked, causing the eve gutters to overflow, but he did not know when or by whom they were put up. And also, by Joseph Harbaugh, that he told Jones, when he was reconstructing his wall, after the first settlement, that if he built again on the same foundation, he would have to build again, as he was on blue mud 8 or 10 feet thick. He said in reply that he thought it had done all the damage it could, but I saw that it did afterwards settle again after he had built upon it a second time.

The defendant then read Neirnsee's deposition and Andrews's, made a part hereof, (copied on page —,) and read the correspondence between plaintiff and Miss Dermott, made a part hereof, (copied on page —,) state evidence of recoupement. (copied on page —.)

And the defendant further read in evidence to the jury the bill of particulars for extra work heretofore filed in this cause, made a part hereof, (copied on page —,) and proved by said Harkness that the same was made out in his handwriting, and shows the whole amount and value of the alterations made, and extra work done by the plaintiff in and about said building, not called for in the specifications at-
50 tached to said written contract. And the defendant further read to the jury the bill in equity, filed on the equity side of this court by the said Zephaniah Jones, against the said Anne R. Dermott, made a part hereof, (copied on page —,) and also read in evidence the motion heretofore made by the said Anne (after filing her answer to said bill in equity) for an election, and the election and disclaimer made by the plaintiff, as filed among the proceedings in this cause; and also read in evidence the petition and order thereon filed by the defendant in said equity cause before the empannelling of the jury in this case, made a part hereof, (copied on page —.)

And the defendant further gave evidence in support of the notice of recoupement, filed in this case, relying upon, among other testimony, the deposition of the witness Neirnsee, hereinbefore inserted; and further gave evidence to show that the whole work done by the

plaintiff was done according to the said written contract and specifications, except the alterations and extra work claimed in said bill of particulars for extra work.

And the defendant having closed his evidence, the plaintiff thereupon, by way of rebutter, gave in evidence, by Jonathan Walker, that certain departures and alterations from the plan of said written specifications were made in the buildings, as follows, viz:

51 1st. That the said Anne R. Dermott required the joists in the first floors of the three stores facing south to be elevated above the level called for in said specifications, and afterwards required them to be lowered, causing *considerable delay* to the plaintiff; that said alteration took place about July, 1851.

2. That she also required the plaintiff to put some folding doors in a room of said building, and when the doors were up she ordered them down again.

3. That an iron girder was placed over the passage walls in third floor, instead of the wooden girder.

The plaintiff then gave in evidence, by said Walker, that he has no knowledge of Miss Dermott telling Mr. Jones that these alterations in the plan of said building must be made if the work was thereby delayed beyond the stipulated time for its completion, except on *one* occasion when the iron girder above mentioned was about being substituted. She then told plaintiff that it must be done if it delayed the work beyond the stipulated time, and she would not take any advantage of such delay.

The plaintiff then offered to prove by said Walker that he was at first employed as superintendent for plaintiff. After the said work was begun he became a partner with the said plaintiff in the furnishing materials and labor in and about said buildings, from the

52 time that the first story of said building was completed, but the said copartnership, by verbal agreement, related back to the inception of said work; and accompanied said offered evidence with further evidence by the said witness to show that said Anne R. Dermott knew of the said copartnership from its commencement, and frequently told the witness that the other alterations must be made if they delayed the work beyond the stipulated times for its delivery, and she would take no advantage of such delay, and with further proof to show that said witness, long ago, before this suit was brought, sold out all his interest in said copartnership to the plaintiff. But the defendant objected to said offered evidence, and the court allowed the same to be given, and thereupon the defendant excepts this 28th day of Nov., 1861.

JAS. DUNLOP. [SEAL]
JAMES S. MORSELL. [SEAL.]
WM. M. MERRICK. [SEAL.]

Defendant's 7th exception.

After the evidence stated in the aforegoing exception, made a part hereof, the plaintiff gave evidence tending to disprove the rebutting

evidence in all its parts, as given by the defendant, viz: (copied on page —.)

53 And the defendant then gave in evidence, by said J. C. Harkness, that the only authority he derived from Miss Dermott, as superintendent of said building, was a request by her that he would see that the plaintiff executed said written contract and specifications; and the said Harkness was paid by her for his services as such superintendent.

And thereupon, the defendant prayed the court as follows, (copied on page 53, &c.) But the court rejected said prayers No. 4, 5, 6, 7, 10, 11, 12, and granted prayers Nos. 1, 2, and 3, and 8, (No. 9 was granted as prayed,) with the written qualifications thereto attached; and the defendant excepts to the refusal of the court to grant such of said rejected prayers, and also to the granting of said prayers Nos. 1, 2, 3, and 8, with the qualifications thereto attached, and claims the same benefit of exception as if the rejection and granting of each of said prayers, with the qualifications thereto attached, were separately excepted to by a separate bill of exceptions, and thereupon this bill of exceptions is signed, sealed, and enrolled this 25 Nov., 1861.

JAS. DUNLOP. [SEAL.]
JAS. S. MORSELL. [SEAL.]

Defendant's prayer No. 1.

If the jury find that the plaintiff and the said Anne R. Dermott signed and sealed the written contract offered in evidence,

54 and signed the written specifications read in evidence as part of said sealed contract, and if the jury further find that the work and labor and materials mentioned in the plaintiff's bill of particulars were performed and furnished in performance of and under the terms of said contract and specifications, except in the particulars of the alterations and extra work stated in the evidence, and if they further find that the said alterations and extra work can be distinguished and separated by the jury from the work, and materials performed and furnished under said written contract and specifications, and that the residue of said work and materials, as done and furnished by the plaintiff as aforesaid, can be traced by the jury, upon the evidence aforesaid, to have been done and furnished by the plaintiff under and in pursuance of said written contract and specifications, then the jury are bound to allow the plaintiff the stipulated price named in said contract, so far as his said work and materials can be traced as aforesaid, to have been done or furnished under and in pursuance of said contract and specifications; and so far as the said price was due at the time of bringing this suit, and for the alterations and extra work aforesaid, the jury are to allow such compensation, as, upon the whole evidence, the jury may consider the same to be reasonably due.

Qualification to def't's first prayer.

But the prices for work and materials to be done and furnished by the plaintiff for the defendant's testatrix, under and
55 pursuant to said contract and specifications, are not to be conclusive upon the jury as to the whole of said work and materials; if the jury should be of opinion, on the whole evidence, that certain portions of said work and materials were done and furnished at an increased cost at a later period of the year than the said contract and specifications contemplated, provided the jury find such later period was brought about by delays, caused solely by def't's testatrix and at her instance and request. But such increased cost, if found by the jury to be so caused, may be added, if, in their opinion, reasonably worth the increase claimed, to the stipulated prices of such materials and labor set out in said contract and specifications; and the burden of proof is on the plaintiff to show such increased cost.

Defendant's prayer No. 2.

If the jury find that the work done and materials furnished by the plaintiff as claimed in this action were done and furnished under and in pursuance of the written contract and specifications read in evidence, except a few alterations and extra work, which can be distinguished from the work and materials described in said contract and specifications; and if the jury further find that the work done by the plaintiff, in pursuance of said contract and specifications,
56 was done in such manner that the buildings named in said contract and specifications, when surrendered by the plaintiff to said Anne R. Dermott, were worthless and unfit for use and occupation, and the said Anne was forced to incur an expense of $10,100, in order to render said buildings, or any part thereof, fit for use and occupation, according to the plan of said contract and specifications, then this defendant is entitled to recoupe the said amount of expense from the agreed price named in said contract, so far as the plaintiff's said claim can be traced, to have accrued to him under the terms of said contract and specifications prior to the bringing of this suit.

Defendant's prayer No. 8.

If the jury find from the evidence aforesaid that the plaintiff so negligently and unskillfully executed the work specified in the written contract and specifications read in evidence, and that from such default of the plaintiff the three stores and warehouses were damaged and injured in the manner stated in the evidence on the part of defendant, then the said defendant is entitled to recoupe from the amount of such claim as the plaintiff may establish such damages stated in the notice of recoupement, as the jury may find from the evidence to have been caused in the premises by such default
57 of the plaintiff.

Plaintiff's qualification to the 2nd and 8th prayers of the defendant granted.

Unless the jury shall further find that the defects existing in said building at the time it was so surrendered were exclusively from the foundation thereof, and if they shall so find, the defendant is not entitled to recover the said damage.

And further, the jury are limited in the allowance of the said costs of reparation, to such sum as was necessary to repair the defects existing when it was so surrendered, and cannot be extended to any damage resulting to the building from the negligence or unreasonable delay of the defendant in making such repairs after she had notice of such defects.

Defendant's prayer No. 3.

If the jury find, from the evidence aforesaid, that the work and labor and materials for which a recovery is claimed in this action, except the alterations and extra work stated in the evidence, were done and furnished under the terms and according to the plan of the written contract and specifications read in evidence, and that the said contract and specifications read in evidence were signed by the plaintiff and said Anne R. Dermott; and if they further find
58 that none of said buildings were delivered by the plaintiff to said Anne fit for use and occupation at the times stated in said contract, but long afterwards, then the defendant is entitled to recoupe from the plaintiff's claim, so far as the same accrued under said written contract and specifications prior to the bringing of this suit, such loss of rents as the said Anne sustained by reason of non-delivery of said buildings, or any part thereof, unless the jury shall find, from the evidence aforesaid, that the said Anne required alterations to be made not specified in the said contract and specifications, which delayed the completion of said work. And unless the jury shall further find that the said Anne, in consideration of the delays aforesaid, stipulated with the plaintiff that he should have an extension of the time prescribed in said contract for the completion of said work, and if the jury find such stipulation for an extension of time, and that no day was limited in such stipulation, then the plaintiff was bound to complete his said work in a reasonable time after the dates named in said contract for the completion of said buildings: and the defendant may recoupe such loss of rents as the said Anne may have sustained, provided the jury find that the plaintiff failed to complete said buildings within a reasonable time after the periods named in said written contract aforesaid.

59 *Plaintiff's qualification of the 3rd prayer.*

If, from the whole evidence aforesaid, the jury shall find that the plaintiff could and would have finished the stores and warehouse named in said written contract on or before the first day of October,

1851, and the whole of said building on or before the first day of December, 1851, except so far as any defects resulting thereto from the sinking of the foundations, but was prevented from doing so by the acts and interference of the defendant during the progress of the said work; and if the jury shall further find that the plaintiff did in good faith diligently work at and complete the said stores and warehouse and building, as soon after the said periods, respectively, as he reasonably could, and did in fact without delay deliver the same to the said defendant in good and tenantable order, (except so far as they were injured by the sinking of the said foundation and the walls connected therewith,) then the said defendant is not entitled to deduct in this action any loss of rents, or any costs of reparation to which she may have been put in repairing or reconstructing so much of said building as was so injured by the sinking of said foundation and the portions of the building dependant thereon.

60 *Defendant's prayer No.* 4.

If the jury find that the whole of plaintiff's claim arose under the written contract and specifications read in evidence, except in respect to certain alterations and extra work performed by plaintiff, and that the reasonable value of said alterations and extra work did not exceed the sum of $1,136 23½, and that said extra work and alterations can be readily separated by the jury from the work done and materials furnished by the plaintiff, under and in pursuance of said written contract and specifications, then it is not competent for the plaintiff to claim in this action more than the agreed sum of five thousand dollars, payable by said contract on the 1st October, 1851, and the value of the alterations and extra work as aforesaid.

Defendant's prayer No. 5.

If the jury find that the plaintiff's claim does not acrue under the special written contract named in the evidence, or if they find that said contract was lost sight of and abandoned by the parties; and if the jury further find that when a portion of said work was done and materials were furnished as claimed in this action, the witness Walker was, to the knowledge of the said Anne R. Dermott, a co-
partner with the plaintiff, in executing the said portion of the
61 work, and furnishing the said portion of the materials, then the plaintiff is not entitled to recover in this action for said portion of work and materials.

Defendant's prayer No. 6.

That by the true construction and effect of the written contract and specifications offered in evidence, the plaintiff was bound to supply and procure every other material, implement, fixtures, matters, and things requisite and proper for the execution of said work, in all its parts and details, and for the complete finish and fitting for use

and occupation of all the houses and buildings, and the several apartments of the houses and buildings to be erected, pursuant to the plans described in the written specifications aforesaid; but if the jury shall find the said buildings, erected by the plaintiff, were not fit for use and occupation because of the sinking of some part of the walls thereof, owing to defects in the substratum of earth on which said buildings were erected, then the plaintiff cannot excuse himself by reason of such sinking, although he may have executed the work precisely and faithfully as described in said specifications; and the defendant is entitled to recoupe such part of the damages claimed in the notice of recoupement, filed in this cause, as the jury may find, from the whole evidence, was sustained by said Anne R. Der-
62 mott, by reason of the default of the plaintiff as aforesaid; provided the jury find that it was possible for the plaintiff to have erected said buildings fit for use and occupation according to the plan of said written stipulations.

Defendant's prayer No. 7.

That it is not competent for the jury, in this action, to charge the defendant with the delays or additional costs caused by changes in the plans and specifications of said written contract, which were necessary and proper to be made in order to render said building fit for use and occupation; and it is immaterial who proposed or furnished the plans contained in said specifications, provided the jury find that the written contract and specifications read in evidence were signed by the plaintiff and said Anne R. Dermott, and that the claim of the plaintiff in this action, except in respect to additional or extra work, arose under the terms of said written contract and specifications.

Defendant's prayer No. 9.

That the evidence given by the witness Harkness in reference to what was said by General Jones, at the time of the execution of the written contract read in evidence, is not competent to affect the rights of the parties in this suit under said contract, nor is
63 the defendant to be bound by the statements made by said Anne R. Dermott as to her obligation under said contract to pay the sum of $5,000 on the first October, even if the jury find the fact of such statements having been made by her as stated in the evidence, provided the jury find that at the date of such statements being made the three stores and warehouses were not delivered over by the plaintiff to said Anne R. Dermott.

Defendant's prayer No. 10.

The court instructs the jury that the plaintiff is only entitled to recover, in this case, the unpaid and undue portion of the sum of $24,000 stipulated in the written contract offered in evidence, and the reasonable value of additional or extra work done and

furnished by the plaintiff, as stated in the evidence, less such sum as the jury may find to have been necessarily expended by the said Anne R. Dermott for the purpose of completing the buildings described in said written contract and specifications, and fitting them for use and occupation according to the plan of said contract and specifications; and also less such damages in the loss of rents as the jury may find to have been sustained by said Anne R. Dermott, from the negligence or default of the plaintiff in executing his said work, provided

the jury find that the plaintiff performed the work and labor
64 for which he claims in this action under said written co
except the extra or additional work and materials
and provided the jury can, upon the evidence aforesaid, di
the amount and value of said extra or additional work and n

Defendant's prayer, No. 11.

If the jury find that the plaintiff did his work and furni materials charged in his bill of particulars, in pursuance under the terms of the ~~within~~ contract and specifications read in evidence; and if they further find that the plaintiff voluntarily abandoned the execution of said contract before the said buildings or any part thereof were fit for use and occupation; and if they further find that the said Anne R. Dermott did not waive the full performance of said contract in respect to the said buildings being fit for use and occupation, and did not accept the work as done by the plaintiff as a fulfilment of said contract, on his part, in the particular aforesaid, then the plaintiff is not entitled to recover in this case for the value of the work done and materials furnished by the plaintiff in and about said building.

But the plaintiff is entitled to recover the reasonable value of the extra work done and materials furnished by said Jones, not
65 under or pursuant to said written contract.

Defendant's prayer, No. 12.

The court instructs the jury, at the instance of the defendant's counsel, that if the jury find that the alterations stated in the evidence were made by mutual agreement of the plaintiff and Anne R. Dermott in the written specifications read in evidence, then the same are not of themselves a sufficient cause for charging the stipulated price set forth in said written contract, unless the jury find from the evidence aforesaid that, at the time of such alterations, (or previously thereto,) being made, there was a stipulation between said parties in regard to a charge in the contract price.

66 *Plaintiff's statement of evidence, referred to in page* 52.

ZEPHANIAH JONES
vs.
JOHN T. INGLE, exe'or of Anne R. Dermott.

At the trial of this cause the plaintiff, to support the issues on his part joined, gave evidence to prove that at the special instance and

request of the said Anne R. Dermott he performed the work and labor,
and furnished the materials particularly mentioned in the bill
67 of particulars filed in this cause on the 2nd of April, 1860,
which said work, labor, and materials, were done and furnished at divers times between the 22nd of April, 1851, and the 5th of April, 1852, and were used in and about the construction and erection of certain buildings erected by the said Anne R. Dermott, and further gave evidence to prove that the said work, labor, and materials, done and furnished as aforesaid, were reasonably worth the sum of thirty-nine thousand eight hundred and sixty-four $\frac{28}{100}$ dollars, ($39,864 $\frac{28}{100}$,) and there the plaintiff rested; and after the evidence in chief of the defendant, as set out in defendant's exceptions, was closed, the plaintiff, to rebut the same, give evidence to prove that the said Anne R. Dermott, for many years prior to the erection of said buildings, had owned the ground upon which they were erected, and had occupied the old buildings, and that the whole scheme or plan as developed in the contract, specifications, and plans offered in evidence, was, and had been for many years, a cherished project of said Anne, who, in the prosecution of the same by her attorney and architect, would allow of no departure from her views, but insisted on the strictest adherence thereto.

The plaintiff further gave evidence to prove that, upon the
68 execution of said contract, he proceeded diligently, and with
sufficient force to perform the same, and so continued to perform until the completion and delivery of said buildings; that there was no delay in the performance of said contract attributable in any manner to the plaintiff, who, but for the interference of the said Anne, from time to time, could and would, with the force of workmen employed and the arrangements entered into for the prosecution of the work, have completed and delivered the warehouse and stores on or before the 1st of October, 1851, and the residue of said buildings on or before the 1st day of December, 1851, the days specified in said contract for such completion and delivery; that the completion of said stores and warehouse, as well as the residue of said buildings, was from time to time delayed by the interference of said Anne, who, from time to time, insisted on certain changes and alterations in the plan of the said buildings as forescribed by the specifications; that against such changes and alterations the plaintiff from time to time protested, and insisted on adhering to the contact, specifications, and plans agreed on, and refused to be responsible in any manner for said changes and alterations, or for the delays which might thereby be caused. And that as to some of said changes and alterations the
plaintiff utterly refused to make the same, or to be in any man-
69 ner connected therewith, or to acquiesce therein, but allowed
the same to be made by the superintendent of the said Anne. And that as to other changes and alterations, the plaintiff refused at first to make the same, but ultimately yielded to the solicitations of said Anne and her superintendent and made the same, with the distinct assurance on the part of said Anne that she would take no advantage of such delay as would ensue therefrom. That all delay

in the performance of said contract was owing to said changes and alterations, protested against as aforesaid, and to the failure of said Anne to select the marble mantels mentioned in the specifications, and to introduce the gas-pipes into said buildings, and also to her failure to obtain from the corporate authorities of the city of Washington permission to place the front steps on 7th street six inches beyond the line prescribed by the building regulations of said city.

That the selection of said mantels had been stipulated for by said Anne, upon whom devolved also the introduction of said gas-pipes, and that until said permission was obtained the said front steps and the iron railing around the area enclosing said *said* stores could not be put up, as called for by said specifications, without a violation of said building regulations, and that the plaintiff had proceeded to put up the same according to said specifications before he was
70 stopped by the express order of said Anne.

That all the said matters were repeatedly brought to the attention of said Anne by the plaintiff, who urged from time to time the selection of the mantels, the introduction of the gas-pipes, and the———the said permission as necessary to enable him to proceed with the execution of said contract; and that in consequence of the omissions and failures of said Anne to attend to said matters, and of the changes and alterations insisted in and protested against as aforesaid, the completion and delivery of said warehouse and stores was necessarily delayed until the 5th of December, 1851, and of the residue of said buildings until the 5th of April, 1852, at which periods said portions of said buildings were delivered, respectively, fit for use and occupation, and in good and tenantable order, except so far as injured by the sinking of the foundation on 7th street, hereinafter mentioned. The plaintiff further gave evidence to prove that the work and materials done and supplied in and about the construction of said buildings were of the best description and fully conformed to the requirements of said contract and specifications, and were equal, and in some respects superior, to any work and materials of like character in the city of Washington.

And further that Anne, in consideration that the plaintiff
71 would make certain changes and alterations, stipulated and agreed to waive the provisions of said contract in regard to the times of completion and delivery, and that the plaintiff made said changes and alterations accordingly.

That when said contract was executed the plaintiff objected to stipulations as to completion and delivery, but it was declared by said Anne and her attorney, who had prepared said contract, that said stipulations would not and should not impair or effect the right of the plaintiff to the remuneration and security mentioned in said contract, provided he performed the work and furnished the materials called for by said contract and specifications with due diligence and in a reasonable time.

The plaintiff further gave evidence to show that, by reason of said changes and alterations and the omissions on the part of said Anne to select the mantels, introduce the gas-pipes, and obtain the said

permission, the expense of executing the said contract was necessarily largely increased, the effect of said changes, alterations, and omissions, being to embarrass the plaintiff in his arrangements he had made for the erection of said buildings, and also to throw the work upon the hands of the plaintiff, when the hours of work were fewer and the amount of work of which men were capable whilst
72 employed was less, and when said buildings had to be heated at the expense of the plaintiff, whereas had he been let alone, as he strove to be, he could and would have executed the said contract and completed and delivered the said buildings at the prescribed periods.

That the plaintiff, having executed and performed diligently and faithfully his covenants in said contract, except as to the article of time as to completion of said stores and warehouse on the 1st day of October, 1851, which delay was attributable to the said Anne as aforesaid, demanded of her a few days after said 1st of October, 1851, the payment of the instalment of $5,000, mentioned in the contract as payable on said day, and that, in response to said demand, the said Anne admitted her liability for said instalment and expressed her satisfaction with the work and materials done and supplied by the plaintiff to that date, but asked indulgence for a few days as, owing to the condition of the stock market, she would not dispose of certain stocks which she was obliged to sell in order to pay said instalment.

That at the time of the demand of said instalment the foundation of the building on 7th street had begun to settle, and that the window heads over the alley were cracked, but the said Anne did not make said sinking the ground of non-payment of said instalment, or any excuse for said non-payment, but asked indulgence in
73 consequence of her want of means. That said instalment never has been paid, though the said Anne was indulged by said plaintiff, as she requested, and it was not until subsequent to the expiration of said indulgence that the said sinking of the wall was made any justification or excuse for the non-payment of said instalment.

That after the completion and delivery of the residue of said buildings in April, 1852, the said Anne failed and refused to perform and execute her covenants in said agreement, for the payment of the said five thousand dollars, and failed and refused to execute the bond and give the security provided by said contract, and that the only payment made by the said Anne on account of said contract on the work and materials done and supplied by the plaintiff was the sum of $5,000, paid on the 1st day of July, 1851. That before said contract was executed, the said Anne employed an architect and superintendent by whom the plans and specifications were prepared, and that such architect and superintendent continued in her behalf to oversee and superintend the performance of the contract by the plaintiff, and to inspect the work and materials done and supplied thereunto by the plaintiff, and that said superintendent and the said Anne, from time to time, during the progress of said work,
74 examined the same and expressed their satisfaction therewith,

and that the same were in conformity with the requirements of said contract and specifications.

The plaintiff further showed that the said earth foundations were dug out in accordance with the requirements of the said specifications and under the direction of the said architect and superintendent employed to see the faithful execution of said contract.

That the same were excavated as low as the vault of the sewer mentioned in the specifications would admit, and that the said excavation revealed an apparently firm and solid foundation of yellow clay. That the said earth foundations were visited by numerous experienced master builders, all of whom expressed satisfaction with the same. That the same were tested with a crowbar and examined and approved both by the said Anne and her said superintendent and architect.

That the drainage of the building at the *at the* corner of 7th street west and Market space was with reference to a sewer which some years before had been built for the drainage of the old buildings, and which was the sewer which it was intended should continue to drain the premises. That during the progress of said work, and until the plaintiff left the buildings, they were completely drained by
75 the plan of drainage adopted and acted on by the plaintiff, under said specifications, and the directions of said architect and superintendent. That the vault of said sewer was on 7th st., near the entrance to said building and from twenty to twenty-five feet from the southeast corner of said building. That there was another and a very old sewer several inches above the foundation, but that the same had long since been abandoned, though the vault of the same was visible when the cellar floors and washboards were ripped up. The plaintiff further gave evidence to prove by four experienced master builders, who had accurately measured the same, that the extent of the sinking of the building at the point of greatest depression was, in all, from $8\frac{1}{4}$ to $8\frac{1}{2}$ inches; that the first sinking was about $4\frac{1}{2}$ inches when the wall was taken down by the plaintiff, and reconstructed upon the assurance of said architect and superintendent that the cost thereof should be paid to the plaintiff, and that subsequent to such reconstruction, the said wall again sunk about 4 inches. The plaintiff further showed that the said buildings were, before delivery, carefully examined in all their parts at his instance and found to be complete and perfect in all respects according to said contract and specifications, except as regards the injury done by said sinking.

76 The plaintiff further gave evidence to contradict the defects in work and materials, whereof evidence had been adduced by the defendant, and further to show that the down spout referred to by the witness Colley was in proper condition when plaintiff delivered the buildings, and that it drained in all a surface of only six feet by eight feet, and that it was not possible for the sinking of the building to have been caused by the water from said spout percolating through the ground, but that the said sinking was caused solely and exclusively by the imperfection of the foundation, whereof the plain-

tiff, the said Anne and said architect and superintendent were alike ignorant.

The plaintiff further offered evidence to show that the damages mentioned in the bill of recoupment of the defendant's testatrix were grossly exaggerated and beyond any loss sustained by the said Anne, and that the same included the consequential damage properly arising from the negligence and unreasonable delay of said Anne and her wrongful and repeated interruptions of the plaintiff in the discharge of his contract as aforesaid; and further that none of said damages were owing to the negligence, fault, or misconduct of the plaintiff,

77 and further that much of the damages claimed for repairing and reconstructing, owing to the said sinking, were, in fact, incurred by finishing and putting up the large warehouse on 7th street, so as to be used as part of the hotel property, instead of as a warehouse, as provided for by said contract and specifications.

The plaintiff further gave in evidence the following correspondence between him and the said Anne; and further gave evidence to prove that the said Anne had refused to perform the covenants and stipulations on her part *part*, to be performed in and by said contract, except making the payment of $5,000, in cash as aforesaid.

Agreement.

DERMOTT } Law case.
vs. }
JONES. }

MR. SMITH: In transmitting the record in the above case, please send up only the supplemental proceedings since the filing of the mandate, as we hereby agree that all antecedent proceedings as appearing in the record, taken up by the first writ of error,

78 may be read from the printed record now in the Supreme Court, to have the like effect as if the whole record of said cause were now transmitted as one entire record.

R. J. BRENT,
For Pl'ff in error.
CARLISLE,
For Def't in error.

June 13, 1862.

79 Circuit court of the District of Columbia.

ZEPHANIAH JONES } In chancery.
vs. }
ANNE R. DERMOTT. }

Humbly complaining, showeth unto your honors, your orator, Zephaniah Jones, that heretofore, that is to say, on or about the twenty-second day of April, in the year eighteen hundred and fifty-one, your orator, then and now being a bricklayer and master builder in the city of Washington, entered into certain articles of agreement with one Anne R. Dermott, whom he prays your honors to make defendant to this his bill of complaint. In and by which said articles

of agreement, for the considerations and upon the terms and conditions hereinafter set forth and referred to, your orator contracted and agreed with the said Anne R. Dermott to take down and remove certain old brick buildings then standing on the lots of ground situate in the city of Washington, and known and designated as lots numbered one (1) and twelve, (12,) in square numbered four hundred and thirty-two, (432,) and to erect thereon a certain other brick building, according to certain specifications referred to in said articles of agreement and made part thereof; that is to say, your orator contracted to perform all the labor, and furnish all the materials for the work so specified, in consideration of the sum of twenty-four thousand dollars, ($24,000,) to be paid and se-
80 cured to him by the said Anne R. Dermott, as follows, to wit: five thousand dollars ($5,000) on the first day of July, in the year eighteen hundred and fifty-one aforesaid; and another sum of five thousand dollars (5,000) on the completion of certain stores and warehouse, part and parcel of the buildings aforesaid, and according to the specifications aforesaid, and the residue of the said sum of twenty-five thousand dollars, to wit, the sum of fourteen thousand dollars ($14,000) on the first day of January, in the year eighteen hundred and sixty, (1860,) with interest as follows, to wit, four thousand dollars, ($4,000,) part thereof to bear interest from the first day of May, in the year eighteen hundred and fifty-one aforesaid, and the reside from and after the complete execution, finish, and delivery of the said work. All such interest, as aforesaid, on the said whole sum of $14,000, to be paid quarter yearly, from and after the time when the same should begin to run; and that, on the complete execution and delivery of the said work, the said Anne R. Dermott should give her bond to your orator for the payment of the said sum of fourteen thousand dollars, ($14,000,) payable on the first day of January, 1860, with the interest, payable as aforesaid, and should also give collateral security for the same in and by a deed of trust upon the property aforesaid, on which the buildings aforesaid were to be so as aforesaid erected; in which deed there should be inserted, among other things usual and proper in such instruments, a
81 clause empowering and requiring the trustee in such deed named to collect and receive from any tenant or tenants of the said premises every such portion and instalment of said interest as should be and remain unpaid and in arrear for the space of twenty days after demand and refusal of the same; and that, as a still further security for the said sum of money and interest, the same should constitute and remain a good and valid lien on all said property, according to the provisions of the act of Congress in such case made and provided.

A true copy of which said articles of agreement, together with the specifications aforesaid therein referred to, your orator herewith exhibits marked complainant's Exhibits, Nos. 1 & 2.

And your orator further shows that he proceeded promptly and diligently to perform and fulfil the said contract on his part; and did, in fact, faithfully and fully perform, fulfil, and execute the same in all

things on his part to be performed, fulfilled, and executed according to the true intent and meaning thereof, and of the parties thereto, excepting only so much and such parts thereof as the defendant herself prohibited and prevented.

And he further shows that the said first-mentioned instalment of five thousand dollars was, in fact, paid to him by the said defendant at the time stipulated in said contract.

82 But that neither the said second instalment of five thousand dollars, nor the said remaining sum of fourteen thousand dollars, nor any interest thereon, nor any part of either of said sums, hath the said defendant paid, or secured to be paid, according to the terms and effect of the said articles of agreement, but, on the contrary therein, hath wholly made default; and upon divers false and unfounded pretexts and excuses hath refused to pay any part of said sums of money or interest, or to execute such bond or deed of trust as aforesaid; and particularly the said Anne R. Dermott, after the said second instalment had fallen due, set up and pretended that the same was not due or payable by her, because the stores and warehouse above-mentioned had not been finished on and by the day specified in said articles of agreement, and refused to pay the same, although the said stores and warehouse were, in fact, finished at the time of such refusal; and the said defendant further set up and pretended that the said work, or some part thereof, had been unskilfully or negligently executed and performed by your orator; and that, by reason of such pretended negligence or unskilfulness, a portion of the wall of said building had sunk or become otherwise defective and insufficient; and upon pretences and excuses as aforesaid, the said defendant hath refused, and still refuses to make any further payment, or to execute any security in the premises, so that your orator

83 hath, in fact, received for his great outlay and labor in the premises, since the month of April, 1851, when the said contract was made, only the said sum of $5,000, leaving a balance of $19,000, besides interest, on said contract, over and above a large sum for extra work and materials not embraced by, or included in, said contract, but from time to time done and furnished by your orator in and about the premises, at the special instance and request of the said defendant.

All which above-mentioned pretences and excuses your orator avers to be without foundation in fact or in conscience; but, on the contrary thereof, charges the facts to be, that as to the times specified in said contract for the completion of the several portions of said work, it was distinctly understood at the time, as he submits the true construction of the said articles of agreement is, that the same were not absolutely fixed and stipulated between the parties, much less that they were in anywise set down as conditions to the payments and securities aforesaid. And further he says that in the progress of the said work the defendant from time to time departed from the specifications and requirements of the said contract, and required great changes and additions in and to the said work to be made and done; a bill of particulars of which extra work, so far as

the same consti[illegible] ground of charge against the said defendant for extra work and materials, he herewith exhibits, marked No. 3,
the same being certified by the architect employed by the said
84 defendant in the premises, who planned and superintended the said work, and drew the aforesaid specifications therefor.

And further he says that *as to the said pretended* neglect and unskillfulness of said work he utterly denies the same, *and if it should be set up or alleged in this cause, and be material to event thereof*, he is prepared to prove and show, as he avers the fact to be, that the said work, and the materials used therein, were in all respects proper, suitable, workmanlike, and in strict accordance with his contract in the premises, and with the directions and requirements of the defendant and her architect, superintendent, and agents in the premises; and particularly that the alleged defect in said wall is not in any degree chargeable to your orator, but is a matter for which he is not in fact or in conscience, on the strictest construction of his contract aforesaid, in any degree responsible.

Your orator further shows that after the said second instalment of $5,000 had become due and payable, he instituted his suit on the law side of your hon'ble court to recover the same, which said suit is still pending and undetermined, the same not being yet at issue. But he is advised and submits that now that your honors have jurisdiction in the premises, by reason of the before-mentioned clauses in said contract, touching the security aforesaid, to decree the specific performance thereof, the whole matter of the said contract hereinbefore
set forth may be enquired into by this court, and all just and
85 proper allowances may be made, and your honors may, by a decree operating on the person of the said defendant, compel her to pay the said instalment of $5,000, with interest, and at the same time specifically to execute her said agreement, and execute all and every writing obligatory, deed, and conveyance which may be found necessary fully to secure your orator in the premises according to the said agreement.

Your orator further shows that the actings and doings of the said Annie R. Dermott in the premises hereinbefore recited and set out are against equity and good conscience, and tend to the manifest wrong and injury of your orator, and he is remediless in these premises by the ordinary rules of proceedings in courts of common law, and can have no adequate relief save in a court of equity where such and matters of the like kind are properly cognizable and relievable.

To the end therefore that the said Anne R. Dermott may answer the said bill on her corporal oath, and may bring into this court the original articles of agreement between your orator and herself, a copy whereof is hereinbefore exhibited, and that she may admit or deny the same, and that she may answer the statement of facts in his said bill as fully and particularly as if the same were here repeated, and she thereto specially interrogated.

And that the said defendant may be decreed to pay to your orator
the said instalment of five thousand dollars, and interest
86 thereon; and that she be further decreed to give to your orator

her bond, as provided in said agreement, for the said sum of fourteen thousand dollars, and to execute and deliver to a trustee, to be appointed by this court, a deed conveying the said land to such trustee, to be held by him upon the trusts specifically set out in said agreement; and that she be further decreed to pay to your orator the said sum of fourteen thousand dollars with interest as aforesaid. And that the said defendant, her agents, attorneys, and assigns be restrained by the injunction of this honorable court from receiving, collecting, assigning, hypothecating, or in any will or manner, charging the rents, income, or profits, or any part thereof arising from, or which may hereafter in any manner come, arise out of, or be derived from the said buildings erected by your orator as aforesaid for said defendant until the further order of this court; and that pending the said injunction, and until the decision of this cause, a receiver be appointed by this honorable court to take possession, charge, and custody of the said property, and to rent the same, and every part and parcel thereof, and to receive the rents, issues, and profits thereout and therefrom arising, and to bring the same from time to time, as the same shall be received by him, into this court, to be disposed of as to this court may seem best. May it please your honors to grant to your orator the United States writ of subpœna and injunc-
87 tion, and for such other and further relief in the premises as to your honors may seem meet, and your orator will ever, &c., &c.

BRADLEY & CARLISLE.
Sol'rs for Compl't.

DISTRICT OF COLUMBIA, *Washington county.* } *sct.*

Be it known, that on this 25th day of May, 1853, in open court, in the circuit court of the District of Columbia, personally came Zephaniah Jones, complainant in the foregoing bill of complaint, and made oath according to law, that the facts stated in the said bill as of his own knowledge are true, and he believes those to be true which are therein stated on the information of others.

Test: JNO. A. SMITH, *Cl'k.*

And said cause was regularly continued until the sixteenth March, 1854, when the said defendant appeared by R. J. Brent, her solicitor, and filed in court here her answer and exhibit in the words following, to wit:

88 *The answer of Anne R. Dermott to the bill of complaint and injunction of Zephaniah Jones.*

This respondent, now, and at all times hereafter, saving and reserving all exceptions to the errors, imperfections, &c., in the said bill contained, for answer thereto, or to so much thereof as she is advised it is necessary for her to answer, says, that she admits that a written contract, stiled articles of agreement between complainant and herself, under their respective hands and seals, and dated on the 22

April, 1851, was on that day duly executed and duly attested by one Walter Jones, and one John C. Harkness, subscribing witnesses thereto; which contract, together with its appendages, part and parcel thereof, to wit: the schedule (A) referred to in said contract, and certain drawings and illustrations of the work to be performed by compl't under said contract, referred to in said schedule as part and parcel thereof, was, by consent and convention of the parties, deposited in the hands of J. C. Harkness, one of the subscribing witnesses, for the common benefit of the parties; to both of whom alike all reasonable access to the same was reserved; that some time in the month of October thereafter, the original contract (without its said ap-
89 pendages) was delivered by said depositary to this respondent for the purpose of enabling her to take a copy; and it so happened that it has remained unasked for ever since, she being quite ready and willing to produce it, should the certified copy filed by complainant require verification, or should the production of it be, for any other reason, required. As to the paper writing filed by compl't as the schedule (A) referred to in said contract, she believes from a general view of the body of the paper, and of the signatures and attestations, (without any examination of its contents in detail,) that it is, so far as it goes, the identical paper writing which it purports to be, but not the whole and entire schedule which it purports to be, in as much as the said drawings and illustrations referred to in the body of said schedule, and constituting part and parcel thereof, are not produced, nor accounted for, though delivered over, as she is certainly informed and believes, by said depositary to complainant, together with the entire body of said schedule.

Now this respondent, further answering, in express and direct denial and contradiction of all the allegations, insinuations, and implications in the said bill contained to the contrary, positively and unequivocally avers and asserts that the written contract, so framed and composed as aforesaid, constituted, and yet constitutes, the sole and only contract or agreement, touching the subject matter of
90 said contract, any time since the execution of that contract, on the 22d April, 1851, as aforesaid, that from that time to this no sort of contract or agreement, or understanding, express or tacit, has ever existed between this respondent and compl't, nor was any act or thing ever done, or in any manner authorized by her, or by any one acting under her authority, or sanction, whereby the said original contract, so framed, composed, and constituted as aforesaid, or any of its terms or conditions, were, in any sort or in any degree, altered, modified, relaxed, or dispensed with, excepting only some few special alterations or modifications in the detail of particular parts of the work described and required in the specifications contained in said schedule; some having been suggested and earnestly recommended by the compl't himself, and others suggested and proposed by this respondent, and adopted unconditionally by compl't, not one of which was intended, or had any tendency in itself, to interfere with the general plan laid in said specifications, or in any way to effect any part of the plan or of its details, but confined, in purpose and in effect,

to the particular and very limited part of the work directly affected by it; and not one of which, nor all collectively, had any the least tendency or was, in any sort, understood by the parties, as
91 going in effect to hinder, delay or postpone for an instant, the execution of the entire work, and its several parts, at the time and times, and conformably to the plan of the work laid out in the contract and specifications; and that none of the said alterations and modifications went materially to increase the expense and labor called for to complete the work, as originally specified in the contract; inasmuch as portions of the work included in the original detail of the contract, more than equivalent to the new work called for by the proposed alterations and modifications, were dispensed with.

And this respondent, further answering, by way of explaining the references in the said articles of agreement and in the said bill, to certain parts and portions of the building in question, says that it has its south front extending about forty-seven feet on that open space of ground commonly called Market space, and is situated at the south-east corner of square 432, a corner formed by the intersection of 7th street west with Market space; and an east front extending north, from the corner, about one hundred and sixteen feet on 7th street; that an alley, opened and established by mutual agreement between this respondent and the proprietor of the adjacent ground, about ten feet wide, crosses the site of said building from east to west about
92 80 feet north of said corner; that the three stores with south fronts on Market space, running back about eighty feet to the said alley, were intended as retail dry-goods stores, each having connected with it, as part and parcel, a cellar intended for the storing of goods and merchandise, all of which, both cellars and stores, were required to be constructed and finished with the utmost care as retail stores and store cellars, and to be particularly adapted to those uses, with dry areas running down to a level with the floor and surmounted with stone capping and iron railing; the warehouse, a large five-story building, was divided from the backs of the three stores by the said alley, and the alley, being arched over with brick between the warehouse and the stores, was left open no higher than the first story, and above that level the upper apartments, through all the four upper stories of the main building, which was intended as an extensive hotel or boarding house, were extended.

This respondent, further answering as to so much of said bill as goes to lay a foundation for decreeing specific performance on the part of this respondent, by alleging faithful and complete performance on his part, in respect both of the time and times within which he undertook to have all the stipulated work and works and the several parts and parcels thereof "executed, finished, ready
93 for use and occupation, and delivered over to this respondent so finished and ready," utterly and positively denies that he did promptly and diligently perform and fulfil the said contract on his part, and as positively denies that he did (as he has most falsely alleged in said bill) in fact faithfully perform, fulfil, and execute the said contract, in all respects on his part, according to the true intent

and meaning of said contract, with such exceptions as he has pretended in said bill; on the contrary, this respondent positively avers that such work as he pretended to have done in execution of the contract was most negligently, carelessly, and unskillfully executed; that neither within the time and times stipulated in the contract for the completion and delivery over of the said building and its several parts, respectively, nor at any time or times whatever did he ever execute, perform, or fulfil the said contract, nor did he within any such time or times, or at any time whatever, execute and finish the said building, or any of the parts or portions thereof, and have the same ready for use and occupation; she also utterly denies that she did ever, by word or act, prohibit, or in any sort prevent, or hinder, or delay the execution of said work and the due performance of the said contract, as he has falsely alleged in his said bill.

As to the time and times stipulated in said contract for the
94 completion and delivery, in a state fit and ready for use and occupation of the said building and the several portions of it designated in the contract, this respondent again asserts, not only of her own personal knowledge, that they were never at any time so finished and ready in execution of said contract; but this respondent has clear unequivocal acknowledgments of the compl't, under his own hand, that they, nor any one, nor any portion of the same, were not so finished and ready within the stipulated times; notwithstanding his false allegation in his said bill that the three stores and the warehouse were, in fact, finished at the time of her refusal to pay the 2d instalment of $5,000, which was on or about the 1st Oct., 1851, when the compl't most urgently demanded payment of the $5,000, and this respondent refused on the ground of his failure to have the same finished, &c., at that time, which acknowledgments are in this wise: First, as to the three stores and warehouse; on the 4th Dec'r, 1851, he sent this respondent written notice importing that the *three stores in the south front* of her building are ready, and have been ready *some days* for occupancy, and that the store and warehouse on 7th street *would be* ready also on that day or the day after, which original notice, all in the proper handwriting of compl't is herewith produced and filed as her Exhibit No. 1, to which she returned an
95 answer, in writing, which was duly delivered to him, and a true copy whereof is hereto annexed as Exhibit No. 2. At that time this respondent was not fully aware of the interior state and condition of said stores and cellars, nor of the buildings generally, but she saw from the outside that they were not ready or at all fit for occupation, for the special reason (as to the stores) stated in her said note, No. 2. That after repeated messages to him, demanding the keys tendered by him, he did, after a delay of five or six days, deliver the keys of the said three stores, and of them alone, accompanied by a note, in his own handwriting, without date, but received some time about the 13th Dec'r, 1851, hereto annexed as her Exhibit No. 3.

Secondly, as to the residue of the said building, she received from him on the 5th, 1852, certain keys, including those said to belong to

the warehouse, accompanied by a note from compl't in his own proper hand, dated 5th April, 1852, hereto annexed as her Exhibit No. 4, to which on the 12th of the same month, she returned a written answer, hereto annexed as her Exhibit No. 5.

As to the excuses which compl't (after positively alleging the due execution and completion of the work within the times required by the contract) sets up for failure in time, this respondent utterly denies the same, and positively avers each and every of the same to be without any sort of foundation in truth or fact.

96 First as to the pretended understanding collateral, as it were, to the written contract, she utterly and positively denies that it was ever understood, either by the compl't or this respondent, that the times specified in the contract for the completion of the several portions of the work were not absolutely fixed and stipulated between the parties, and were not set down as conditions to the payments and securities required of this respondent by the contract; and she expressly avers that the total contrary was not only stipulated by the terms of the contract, but *distinctly understood* by both parties; that throughout the whole negotiation between them, which resulted in the said contract, the time within which the work was to be completed and delivered, fit and ready for use and occupation, was distinctly considered and treated as of the essence of the contract, and as such anxiously discussed on both sides. This respondent was dependent on the expected rents for the intended building not only for support, but for supplying the means of paying the debts contracted on that account, and other pressing obligations. Having been deprived of her ordinary income by pulling down a valuable and extensive building to make room for the new structure contemplated in the said contract, autumn was the only season when she could reasonably expect to find tenants, and unless the building was finished during

97 the autumn ensuing the date after contract, it was to the highest degree improbable that tenants could be got before the next ensuing autumn. The contract was at first prepared pursuant to the preliminary agreement of the parties, fixing the 1st Nov., 1851, for the completion of the whole work, but was altered to the 1st Dec'r at the pressing instance of compl't, and the contract was distinctly explained in compl't's presence, and clearly understood by him, at the time of execution as making the execution of the work within the times specified in the contract, strict conditions on which alone he was to be entitled to demand the payments and securities stipulated on her part. The respondent again denies the compl't's reiterated allegation that his delays in the execution of the work were occasioned by the acts, defaults, and omissions of this respondent; and also again denies that she departed from the specifications of the contract and required great changes and additions any other way, or to any other effect, than the alterations and modifications of the detail, in part, willingly and freely adopted by him on her suggestion, and, in part, by her on his own suggestion and recommendation in manner and form, as she has already admitted and explained in the foregoing part of this answer.

So much for the *times* specified in the contract. Now, for the sort of work which this respondent discovered (after careful and thorough examinations of the building, after she received the keys from
98 compl't on the 5th April, 1852,) that the compl't was attempting to palm off as in full and complete execution of his contract.

As to that, this respondent, further answering, says, that a considerable portion of the wall of the east front, extending from the warehouse over the alley a considerable distance south of the alley, had given way at the foundation, and caved over so much as to make an inclined plane of the floors at a very considerable angle to the horizontal line, and rendering the rooms uninhabitable, and, also, preventing the windows from shutting down on their sills by several inches at one side of each sash; that this wall bore the most alarming aspect to all passers through Penn'a Avenue and 7th street, and threatened destruction to a large portion of the building, (and what portions of it were exempt from the danger no one could tell,) so as not only to endanger tenants and occupiers, but even accidental passengers, and the danger was so palpable and imminent as to attract the notice of the city authorities, by whom the walls would have been abated as a nuisance if this respondent had not been found actively engaged herself in removing and rebuilding the walls, as appears from the proceedings of the street commissioner, Mr. Lord, and the board of health, hereto annexed as her Exhibit No. 6.

She avers that compl't, with the grossest and most wilful negligence, knowingly built the walls on what he was fully apprised
99 by competent judges was an insecure foundation, and willfully neglected the obvious means of securing the foundations. Another wall, also on the west side of the building, had also given way, and had, in like manner, to be removed and rebuilt. All, as she has ascertained, occasioned in part by compl't's failure to secure the earthy foundation underlying the wall, and also by the bad and unskilful manner of building the foundation walls themselves. The arch of the alley also gave way, and the compl't attempted to arrest its further spread by the poor and futile expedient of iron clamps, instead of sound foundations and abutments This condition of the walls alone would have prevented and made unsafe the occupation of the premises, whether dwelling part or stores. But this was not all the defects in the building inconsistent with occupacy for the purposes intended that were discovered. The floors of the store cellars were placed some inches below the level of the drain, through which alone water, either rising in the cellars or passing into them from without, could be carried off; several of the rain pipes and gutters, which were to receive and carry off the water from them, were so constructed as that the rain water from the roof had no way of escape but to sink down into the foundation, to the great detriment and damage of the walls. From this combination of causes, the
100 turning into the cellars rain water from the roof, which ought to have passed off through proper gutters on the surface, and the want of drainage, or rather the actual obstruction to drainage, the cellars were overflowed with water, and rendered not only unfit

for the storage of merchandise or any other use, but most noxious nuisances. The whole work in the store cellars had to be removed and rebuilt at vast expense and labor. Besides these, more dangerous and fundamental vices in the building, innumerable defects arising from the grossest negligence, if not wilful fraud, were found in every part of the premises; the floors throughout the whole of the four stories above the stores were of the most shameful kind, both as to workmanship and material; consisting in part of worn and splintered plank, apparently ripped from some other building; presenting snags and splinters in the middle of some of the floors, and all, if not consisting of old splintered plank, made of the mere refuse of short and knotty boards of the worst description to be found in the board yards; and even of this refuse trash some of the boards were laid unplaned in the floors, and presented the rough weather-beaten and discolored surfaces with which they were brought from the board yards; and, instead of being fastened down by the usual means of secret nailing, presenting the large heads of nails, some sunk deep and leaving holes in the planks, and others left above the sur-
101 face in the way of persons walking over the floors; the hand rail and ballusters also, going up with the stair cases through four stories, and which ought to have been all of good mahogany, were, in some of the most material parts, constructed of doated cedar, and so loosely and badly put together as to be in imminent danger of falling down. These two last defects, the flooring and the rail and ballusters, with others too tedious to enumerate, have not yet been removed and supplied, and must at some future day occasion this respondent a heavy expense. Independent of these, the expenses already incurred by this respondent in removing and supplying the defects left by the compl't in the said work, amount to between 10,000 and 11,000 dollars. What is to be the expense of supplying the other existing defects must be very considerable, besides the damage she sustains from the bad quality of the foundation walls, and other defects which she cannot remedy; all which go to diminish the intrinsic value of the building. She has lost on an average more than a year's rent, at the rate in the aggregate of more than 8,000 dollars per year, in consequence of compl't's said breaches of contract. The compl't has received in cash $5,000 from this respondent; the value of the materials of the old building removed by him is not less, as she has good reason to believe, than 5,000 or 6,000 dollars, so that he is the party bound to refund rather than the party entitled to
102 claim.

This respondent, further answering, says, that if compl't had completely and faithfully executed his contract, as he pretends, he would not have had at the time he obtained this injunction any color of a pretence to claim any lien on, or attachment, or sequestration of the rents of the premises, except for about two years' interest of $4,000, and about 15 months' interest of $10,000; yet, by false suggestion and fraud, he has contrived to obtain from the court an injunction tying up all her rents, which amounted, at the time the injunction in this case was issued, to eight thousand two hundred

dollars per annum, which more fully appears from the original leases hereto annexed, and thereby exposed this respondent to cruel hardships, depriving her of the means of subsistence, and exposing her to the most harrassing difficulties in providing for engagements expected to have been satisfied out of such rents, and among such engagements a very large proportion of the identical costs and charges necessarily incurred by this respondent in constructing a habitable building in place of the pile of incumbrances and nuisances which the complainant had fraudulently attempted to palm upon her, and is now fraudulently attempted, by his said bill, to palm upon the court, as a building finished and complete, fit and ready for use and occu-
103 pation according to his contract.

As to the complainant's said bill of extras, she believes it to be trumped up and fraudulent; she sees that a considerable portion of it consists of charges for work and materials in the course of abortive attempts to bolster up his sunken walls and spread arches; at any rate, she has not received any sort of benefit whatever from the pretended work, &c., therein charged. If perchance any part or portion of the extras charged in said bill would have been at all beneficial to this respondent, and wonld have been legally chargeable to her as extras in case the entire building had been duly constructed and finished according to contract, and that in such case they would have been so, she admits not, believes not, but expressly denies; yet, as as part and parcel of such a building as complainant threw upon the hands of this respondent, they are all absolutely nullified and inadmissible in any amount which this court is competent to order.

This defendant denies all fraud, &c., and prays to be hence dismissed with her costs, &c., &c.

ANNE R. DERMOTT.
ROBERT J. BRENT.
JOHN CARROLL BRENT,
Solicitors for Defendant.

104 DISTRICT OF COLUMBIA,
Washington county, to wit:

Anne R. Dermott, the respondent named in the annexed and foregoing answer, this day personally appeared before me and made oath, in due manner and form, that the averments, matters, and things therein contained and averred, as of her own knowledge, are true as therein stated; and as to all others, she has good reason to think and believe, and does verily think and believe that the same are also true.

Sworn to before the subscriber, a justice of the peace in and for said county, this 16th March, 1854.

T. C. DONN, *J. P.*

105 *May term*, 1854.—*Jan'y term*, 1856.—*Leave to take testimony.—Bill dismissed as to* $5,000.

And said cause, with the consent of the parties and by order of court, was continued until the May term of eighteen hundred and

fifty-four, (1854,) when the same orders were made, on motion of the defendant, that the complainant should elect to take his choice of cases as in the case at law in printed record in the Supreme Court, and the same proceedings were had, as in that case, and said cause was regularly continued until January, eighteen hundred and fifty-six, (1856,) when the complainant entered a general replication to the answer; and with the consent of the parties, by their solicitors, and by order of court, leave was given to the parties to take testimony before W. R. Woodward, esq., and said cause was regularly continued until the twenty-ninth April, (29,) eighteen hundred and fifty-six, (1856,) when the complainant having elected to prosecute the case at law for the five thousand dollars ($500) mentioned in his said bill, it is by the court ordered that the said bill in chancery in this case be dismissed, and the same is dismissed accordingly, *quo ad.* the said five thousand dollars, ($5,000,) and the said cause was regularly continued until the fifteen (15) day of November, eighteen hundred and sixty-one, (1861,) when W. R. Woodward, esquire, filed, in court here among others, the following depositions:

106 *Deposition of Jno. R. Niernsee.*

John R. Niernsee, a witness produced on the part of the defendant in the above cause, on being duly sworn by me, doth, in answer to the interrogatories propounded to him by the counsel for defendant, and as hereinafter given, depose and say as follows:

1. First interrogatory. Please state your profession and business; how long you have practically engaged in the pursuits of such profession and business; at what places, and what *are* the nature and extent of your experience as professional architect in the planning and construction of public and domestic edifices.

Answer to the first interrogatory. My profession is that of an architect and civil engineer; I have been practically engaged in that profession ever since eighteen hundred and thirty; I studied for that profession, never followed any other business, principally in Baltimore for the last twelve years, in Baltimore, in the State of Maryland, in general; in Washington city; in Newport, R. I.; New York; Virginia; my practice extended to Virginia, I never resided there; in New Orleans. In the last year I have been engaged in Columbia, South Carolina, as chief architect in erecting the new capitol there. Since eighteen hundred and thirty, (1830,) that is twenty-six years' experience. I have carved out, and planed,
107 and superintended four or five hundred public and private buildings. I have been called as associate commissioner to investigate the causes of the failure of the centre part of the Smithsonian building, in this city, some six years ago. I have also been engaged by the government, in the engineer department, on fortification under General Totten.

2. Second interrogatory. Did you become acquainted, and about what time, with the state and condition of a building belonging to def't, Miss Ann R. Dermott, and then newly erected at the corner of

Market space, on seventh street, (7,) in the city of Washington, and were you employed, in the line of your profession as architect, to plan and have executed, under your superintendence and direction, the necessary reparations and reconstructions of said building?

Answer to the second interrogatory. I got introduced to Miss Dermott in June, or early in the summer of eighteen hundred and fifty-two, (1852,) by Col. Andrews, and at her request and her representations that she could not get persons in the city of Washington to undertake the restoration of the building on the corner of Seven street and Market space. After an examination, I undertook to restore it to a safe condition, so as to make it habitable, taking the charge of it as architect and superintendent, general super-
108 intendent.

3. Third interrogatory. Please state and explain the general plan and extent of that building; its front on Market space; its extension, Seven (7) street; the general plan as to its distribution of the building as regards dry goods stores, and cellars, warehouse, &c., and living apartments above stores, alley, &c., &c.

Answer to the third interrogatory. The building fronts, at south, on Market space, about forty-seven feet and a half, extending back, on Seventh street, eighty-feet, to a ten-foot private alley; then a warehouse fronting on seventh street, about twenty-six and a half feet front, running back, westwardly, eighty-five (85) in depth, with a yard of ten feet. The front building on Market space is divided into three stores; the corner store, of eighteen feet in width, running back the whole depth of eighty feet, divided by a fourteen-inch division wall from the centre store, which is about the same width and depth as the corner store, with the exception of the space taken off at the back end for a private stair, giving access to the upper part of the building from the alley. The centre store also widens out at the back end nine feet for about twenty-eight feet in length, under a skylight which lights the back part of the building. The walls of that skylight for the four stores above the stores above the
109 stone, being supported by iron columns and girders in that portion of the store.

The third store on the west of the main building is about nine feet wide, running back about fifty-two feet to the before mentioned skylight.

There is a basement under the whole of the buildings. That under the stores in front being divided into two store rooms running back to within twenty-five feet of the alley. That space of twenty-five feet being occupied as a back and main kitchen for the upper or boarding part of the building. The pavement of the private alley under the building being supported by a brick arch forming a coal cellar or fuel cellar underneath. There is also a cellar under the whole of the warehouse on seventh street. The front of the whole building on Market space and Seventh street is surrounded by an area of the depth of the cellar floor. All the buildings are five stories above the basement. The front building on Market space above the stores, as far back as the alley through its four stores, was divided off

into usual appartments for the use of a boarding-house. All the stores above the warehouse were left undivided, being connected by a stair in the usual manner of a warehouse of that description.

The upper part of the main building above the first floor extends also over, is built over the alley as far as the south wall of the warehouse. The access to the boarding-house above the stores is
110 by a flight of granite stairs about the centre of the building on Seventh street.

4. Fourth interrogatory. Please state and explain the actual state and condition of that building as you found it.

1st. As to the cracking, splitting, and sinking or settling of the walls of the said building; the nature and extent and particular situation of such defects in the walls, both of the warehouse and main building ; and of the alley, including the wall resting on iron pillars at the skylight in the western side of the main building, and state the degree and imminency, in your opinion, of the danger, if any, of the said walls, or any of them, falling to the ground.

2dly. As to the visible effects of the state and condition of the walls on the floors and windows of the apartments affected by such state and condition, and how many, and which, of the apartments are so affected.

3dly. As to the effects of the same causes upon the external appearance of the building, visible and obvious to the eyes of casual way passer and beholders ; please describe such appearance.

4thly. As to what impression, as to the stability and safety of the building, such external appearance was like to make, or must necessarily have made, on the minds of casual way passers and beholders.

111 5thly. Was the said building, at the time you examined it, preparatory to your operations on it as architect, in your opinion, ready or fit for use and occupation, or would a tenant (if any one could have been found willing to try the experiment) have occupied it safely, or would such occupation have been attended with any danger to life or property ?

Answer to the fourth interrogatory. Commencing on the outside of Seventh street, the wall above the alley and adjacent to it had settled to a considerable extent, and showing cracks on the main wall both to the north and south of that position.

The roof above that place had also sunk with the wall. The wall upon top of that portion had likewise bulged out about six inches. The pillars and girders on the warehouse front, on the north of the alley, and that portion of the store front on the south of the alley, had likewise sunk, breaking the girders and throwing the iron pillars out of a perpendicular position. All of the windows of the upper part of the warehouse, on the north of the alley, and also those of the boarding-house above the alley, on the south, had sunk towards the centre of the alley. Most of the window-sills, marble window-sills, and lentals of the whole building on Seventh street were out of level and broken, cracked. The crack on the main wall extended the whole length of the building.

112 In the interior, the south wall of the warehouse, to the extent of about sixty feet from the Seventh street wall, had settled to a most considerable extent, the west settlement being near its connection with the front wall on Seventh street, it amounting there to nearly twenty-four inches, between twenty-three and twenty-four inches, diminishing gradually towards the west end of the wall. The front wall having bulged out and seperated from the south wall of the warehouse to the extent of between three and four inches on top of the building. The back wall of the main building on the south of the alley had likewise settled to a considerable extent, but not so much as the northern wall.

The back end of the division wall between the two stores, to the extent of about twenty-five feet, at its connection with the south alley wall, had sunk to the same extent with the south alley wall.

The stone wall supporting that on pillars under the skylight had likewise sunk and shown signs of splitting to such an extent as to break several of the stone bases on which the iron columns rested, and also to break several of the caps and girders on the tops of the columns, cracking the brick arches over the windows above and throwing the frames out of square. It is my opinion that the walls heretofore described, particularly that part over the alley on Seventh street, and a portion of the south wall of the warehouse, would
113 have further sunk and fallen in a very short time, which must certainly have happened if the warehouse had been stored with the usual amount of goods for which it was intended.

The effects of the settlement of warehouse walls was visible in the inclined position of the floor of said building from north to south, the difference in level at that portion nearest the Seventh street wall being found nearly fourteen inches by trial, besides the walls showing definite signs of the joists having already been leveled or raised up to the extent of nine inches; the northern portion of the floors of the stores, and that part of the building above them, showing less, although perceptable settlement.

The settlement in the floors near the skylight showed of from two to three inches. The windows in the whole of the warehouse front, on Seventh street, were drawn out of square, and inclined to the south to the extent of several inches. Those to the south of the alley on Seventh street and in the back part of the warehouse, in the west wall, as also the windows above the skylight, had been drawn more or less out of square, in all cases to such an extent as to prevent the shutters from closing, or the sash from coming down on the sill within several inches.

The appearance of the building to a casual passer by was that of a building threatening to fall down. I do not think the building was habitable with safety when I examined it, preparatory to my
114 commencing operations as an architect; nor do I believe that a tenant could have been found to make use of the warehouse for the purposes for which it was intended or built, even if he had it rent free.

I believe there would have been great danger to property, and even life, in the occupation of the building.

5. Fifth interrogatory. Please state in detail the condition of the drainage through the cellars and areas, and *and* through the alley, and whether there were any, and what, obstructions to the drainage of the waters rising in the cellars, and of rain-water falling into the areas and conducted into the alley through water tubs and spouts from the roof, or from rain direct into the alley and areas. What, if any, were the obstructions to the free passage of the water through the covered part of the alley into the street gutters, or which may have caused it to pond into the said covered part of the alley; and what were the necessary and natural effects of the state and condition of the drainage upon the earthy foundations of the walls, and upon the masonry overlying such foundations.

Answer to the fifth interrogatory. The drainage was very imperfect, if drainage it could be called at all; if the name of drainage could be applied to the really sunken gutter which I found laying in a level position under the floor of the two kitchens leading from the
115 area under the skylight to the area in Seventh street, and the water in which could only vent through the points of the flooring, overflowing the floor and emptying itself over the door-sill into the area in Seventh street. The only other drainage which *which* may have existed, besides this sunken drain, was supposed to consist in grading the general floor of the cellar, or the ground forming such, with a slight fall from the northern to the southern extremity of the building; but the flow of any water in that direction must have been entirely obstructed by the four cross walls running from east to west, across that supposed declivity of drainage. Moreover, all the trenches for those cross walls, and, in fact, all other foundation walls of the whole building, being sunk from six to twelve inches below that so-called draining surface necessarily formed and laid, the drainage into and right directly around all the foundations of the building, which being on a level, and so many inches as before mentioned below the cellar floor, and the pavement of the area around the building, caused the water to stand there, and could only overflow after it reached the top of said area pavement, thus softening the earth and clay foundation directly under the walls and causing the building to settle. In addition to this want of drainage, any water springing from the ground or percolating through the soil of the surrounding higher part of Seventh street, there were four
116 water spouts which carried off the water from the main roof of the house to the ground; two were situated on Seventh street, on the north and south corner of the alley, and two at the end of the main building, at the distance of about forty-eight feet west from the front on Seventh street, up the alley. The two latter down spouts were found unfinished and without any elbow or spout stones below them to intercept the force of the column of water falling through the spouts the heigth of the whole building, and consequently washed out the soil below into large holes or pits, directly on the outside of the foundation walls of the building at these points, thus carrying the

water down into the foundations, instead of out through the alley into the gutters. The surplus water falling on the surface of the open alley beyond found also its way through those holes down into the foundation. Moreover, the brick arch over the cellar in the alley having sunk with the walls as they settled, and the said arch opened at the ground caused that part of the alley to sink considerably below the level of the sidewalk and gutter in the street, and thus pond up any water flowing in that direction, but finding its way through the cracked arch into the cellar below. The front spout on the north corner of the alley on Seventh street was both finished with an elbow and a large granite spout stone, which latter was originally undoubtedly laid with the fall toward or towards the gutter on the street, but the front wall at that point having settled to such a consider-
117 ble extent, as heretofore mentioned, caused the spout stone to settle with it, and to reverse its intended fall by several inches towards the building, and thus lead all the water from that spout directly to the foundation. The effect of all this flow of water into the foundation at the corner of the alley were visible by forming there a large pit of mere mud, directly under and around the walls at that point, and of such depth and softness that an iron crowbar of some six feet in length sunk into it by its own weight.

6. Sixth interrogatory. What was the state and condition of the floors of the two stone cellars on Market space as to their fitness for the storage of dry goods?

Answer to the sixth interrogatory. The water had penetrated through those floors and partly overflowed them, and especially that of the basement of the corner store, causing dampness in the walls and plastering, and making those basements entirely unfit for the storage of goods.

7. Seventh interrogatory. By what means mechanical appliances were the cracked sunken walls removed and supplied with safe and substantial walls, the foundations drained, and the future drainage provided for?

118 Answer to the seventh interrogatory. The portion of the front wall on Seventh street, directly over and adjacent to the alley, was taken down to the extent of about twenty-five feet in length from top to bottom; a timber platform of a double row of logs eight feet in width was laid about two feet below the cellar level; the first row of timber laid crosswise eight feet in length, the second row lengthwise in the direction of the wall twenty-five feet in length; upon that timber platform was laid a cast-iron girder in the direction of the wall twenty-five feet in length, three feet in depth, with flanges of two feet in width, on which the new foundation wall was built of brick laid in hydraulic cement twenty-six inches in thickness up to the level of the store floor, and thence the front wall was carried up eighteen inches in thickness in the usual manner. The sunken part of the south wall of the warehouse, to the extent of about six feet in length, the southern wall of the alley forming the northern wall of the said building to its length of about forty-seven feet, and twenty-five feet of the north end of the division wall

between the kitchens in the basement, were shoved up and underpinned by taking out short lengths of said walls, say from ten to twelve feet at a time, putting in a double timber foundation, as heretofore described, and laying *and laying* flagstones of five feet in width, and from nine to twelve inches in thickness, on top of said tim-
119 ber platform, and thence raising the new foundation walls with brick laid in cement, and twenty-two inches in thickness, to near the level of the store floors, meeting there the old walls standing above it, and wedging and underpinning them with brick and iron wedges. The old and cracked walls standing above them were thoroughly repaired in the best manner by cutting out in the duction of the cracks and inserting new brickwork, knocking off the loose and defective plastering on them and replastering them anew. The new stone wall supporting the iron pillars under the skylight having likewise sunk, and showing signs of splitting lengthwise, made it necessary to shove up the iron girders on which the brick wall of the upper stores rested, remove the iron pillars, take down the stone wall of the foundation, form a new foundation below the cellar level of timber and flagstones in the manner heretofore described, rebuild said cellar wall for the support of the columns in the best manner, provide new and strong granite bases for the iron pillars in the place of the old broken ones, cast new and stronger caps for the pillars in place of the broken ones, and reset those cast-iron pillars.

The nine-inch brick wall standing above the iron girders was lifted up gradually and in parts by means of powerful screws to the extent of several inches, and thus the sunken part of the upper floors near the skylight to near their original level.

120 The drainage of the whole cellar and foundation of the building was the most deficient part to be effected on account of the mouth of the sewer, situated at the corner of Market space and Seventh street, being only a few inches lower than the floor of the basement; but by following that sewer for some distance down its direction towards the canal, and decreasing the fall in the bottom of that portion, we obtained sufficient depth at the mouth to lead a system of drains from every part of the building with a slight fall towards the main sewer; said system of drains consisted of two mains running in the centre under the basement stores the entire length of the building from north to south, a main branch being laid in the centre of the warehouse cellar, running through entire length from east to west, also a similar one laid in the same direction in the cellar under the alley, and numberless cross branches leading from the foundations with a slight fall towards those two main trunks, thus draining all the cellars and foundations. The drainage of the area on Seventh street from north to south likewise formerly obstructed by the crossing of the alley, with no perceptible fall in the pavement of the area in the direction of the sewer, we relaid that pavement and formed an unobstructed gutter with an effective fall from the north to the south extremity.

The old defective cellar arch in the covered part of the
121 alley was, of course, taken down; and when the footing or new

foundations on the north and south walls were rebuilt, cast-iron girders crossing the alley at spaces of about nine feet apart from each other were inserted in said walls and brick arches, laid in hard brick and cement, were thrown in the form of a segment from one gutter to the other, and the pavement above finished with a fall towards the centre, and from the open part of the alley to the gutter in Seventh street, said pavement being constructed of hard brick laid edgewise in cement in the closest manner.

8. Eighth interrogatory. State the necessary and the actual cost and charge of the various works found necessary to place the said building in a safe and habitable condition, and which were actually executed, for that purpose, under your direction as architect.

Answer to eighth interrogatory. The actual cost or reconstructing the building and the repairing of it in the aforesaid described manner, all of which were necessary and unavoidable to put the buildings in a safe and habitable condition, and to be used in accordance with their original intention, viz: warehouse, stores, and boarding-house, was ten thousand one hundred and thirty-seven dollars and sixty-seven cents, ($10,137 $\frac{67}{100}$,) for all of which there are vouchers in the possession of Miss Dermott, delivered to her by me.

122 9. Ninth interrogatory. Suppose the cracked and sunken walls, which you have described, as well those on Seventh street as the wall resting on iron pillars and supporting the roof at the skylight, had been left to fall from the intrinsic defects of their construction or foundations, instead of being carefully removed in the manner you have described: what might have been the extent of ruin to the building? Would it have effected the various parts of the roof resting upon such walls, and to what extent might have been the consequential dilapidation, if any, of the roof of the warehouse; of the roof of that part of the front building extending along Seventh street to the alley, and of the roof resting on the wall supported by iron pillars at the skylight?

Answer to the ninth interrogatory. The fall of all those sunken and cracked walls, which have been underpinned and reconstructed as heretofore described, would have caused, without doubt, in my opinion, the total ruin and destruction of at leat sixty-feet in depth of the warehouse on Seventh street; all the portion over the alley, and at least forty feet of the back or north end of the main building, and consequently brought all that portion of the roof over it down with it.

123 10th. Tenth interrogatory. How many, and which, of the three stores fronting on Market space, and how much of the warehouse would have been necessarily *removed*, and in what degree, in the dilapidations consequent to such falling down of said cracked and sunken walls?

Answer to the tenth interrogatory. About two-thirds of the whole of the warehouse and about one-half of the stores, already stated by me in answer to the ninth interrogatory.

11. Eleventh interrogatory. Please examine the testimony of John W. Colley, delivered in his examination before the commissioner, in

this case, on the ult'o, and say what, in your opinion, would necessarily have been the consequence to the roof of the warehouse or other consequential dilapidations, if the wall of the warehouse, at that part where it had been pushed out by the displacement of the rafters, as described by Colley, had been pushed a few inches further outwards, or if the rafters or ceiling points had been pushed or drawn much beyond the ⅜ inch, on which Mr. Colley described them as hanging.

Answer to the eleventh interrogatory. I have examined Mr. Colley's (the builder) statement above referred to, and am of opinion that if the condition of the roof was such as described by Mr. Colley, that the further bulging out of the walls to the extent of three-eighths of an inch or more, as therein mentioned, would have
124 caused that portion of the roof inevitably to fall down, or throw the upper part of the wall into the street.

JOHN R. NEIRNSEE,
Architect and Builder.

Sworn to and subscribed by the said John R. Neirnsee, before me, this sixth day of March, A. D. 1857.

Deposition of Chris'r Andrews.

Christopher Andrews, a witness produced on the part of the above defendant, who, being duly sworn by me this twenty-eighth day of January, eighteen hundred and fifty-seven, doth, in answer to the interrogatories propounded to him by said defendant, and hereinafter following, depose and say as follows :

1. First interrogatory. Had you opportunity, and what opportunity, of being acquainted, and were you well acquainted with the building belonging to defendant, at the corner of Seventh street and Market space, both as it was before complainant undertook to remove it and build anew on its foundation, and as it was after he had finished his work and given up the building to defendant ?

Answer to the first interrogatory. I was well acquainted with the old building, for I was one of the referees as to that building
125 after it was constructed. I examined the new building before and after it was thrown on the defendant's hands unfinished, as I considered it, by the complainant. I had examined it at the request of the defendant. I never went there voluntarily myself.

2. Second interrogatory. Please describe the old building, its size, plan, construction, &c.

Answer to the second interrogatory. It was a substantial brick building fronting on Market space, about the same front that it has now, and extending along Seventh street up, according to my recollection, to the south side of the alley, differing from the old as to its entrance. The entrance to the old building was on Market space. The old building had two stores on Market space, while the new has three stores. I don't recollect now whether the old building was three stories above the store. My impression is that it was a three-story house.

3. Third interrogatory. Please state whether the walls of the old building were sound, solid, and upright, free from cracks and sinking, or were they defective and unsafe from faults either in the foundation or bad workmanship.

Answer to the third interrogatory. I have always under-
126 stood that the foundations were perfectly sound and good. I have been through the house with the owner before the new building was constructed, and I never heard anything to the contrary. I want it to be understood that I never went there on matters of the kind of my own accord, but at the solicitation of the owner. At the time I examined the old building, it was with a view to her (the complainant's) intended alterations.

4. Fourth interrogatory. Did you observe the progress of the new building in the complainant's hands, and what did you observe, or what came to your knowledge from time to time, in respect to the sinking, cracking, and giving way of the walls of that building, and what conversation or conversations had you with complainant on that subject, and in reference generally to the foundations and construction of the building?

Answer to the fourth interrogatory. Yes; I did, at the request of the owner, observe the progress of the new building in the complainant's hands. The first case of any importance was when Mr. Jones, the complainant, was about to put on the cornice, Miss Dermott called upon me and stated that Mr. Jones was urging her to put a wooden cornice in lieu of the brick, and begged me to go to the building with her and see Mr. Jones on the subject. I did so, and
127 met Mr. Jones at the building, and asked him the question, if the foundation was firm and good; and Mr. Jones said, in reply, that it was as any foundation could be, a strong expression of that kind; and I then remembered, in reply, if that was the case, he might build twenty stories upon it, and I could not see why he should object to put the brick cornice, as the contract called for; Mr. Jones then remarked that if Miss Ann desired he would do so, or words to that import. The next occasion of any importance was after the first break in the building, and when he was at work about to repair it. Miss Dermott asked me to go to the building and examine the iron support for the archway of the alley, which Mr. Jones was about to put in. I did so, and after examining it where it was pointed out by Mr. Jones, in conversation with him I asked him the question, if he had examined the foundation upon which he was rebuild. He stated that he had not, but that it all should be right before he was done with it. The next occasion of any importance was after the second break of the building. Coming out from Georgetown in the omnibus, Mr. Jones got into the omnibus and took a seat next to me, on my right hand. I said to him jocularly, Well, Mr. Jones, I hear your building has cracked again. He said yes, it was; but that it should be right before he was done with it. I examined the building
128 afterwards, at the request of the owner, after Mr. Jones had given it up. I went through it with General Jones, Mr. Nierensy, and Richard Snowden Andrews, before they began to repair it,

as to its condition; I found the cellars to be wet under the warehouse and vault, and under the front building, stores, and kitchen also.

After that, when the foundations were exposed, and they were preparing to rebuild, I examined it. The entire cellar foundation was nothing but mud and water; the whole cellar was in the same condition. I saw a brick that was taken out of the fireplace of the kitchen under the main building, and it was setting in water in the fireplace. The foundations were in the same condition, sobbed in water, particularly in the line of Seventh street, and the stone pavement of the vault and in the warehouse was in the same condition, and the top of the vault was cracked. I afterwards had my attention called to the work beneath the brick piers upon which the walls rested. The foundations of those piers upon which they had rested were bluestone pieces and were crushed. My attention was called to it by a mason or workman, it to rebuild upon it.

I also went through the building generally, and saw the condition of the floors and sinking of the walls. I found the floors to be very rough and nailed through the top, through the plank, not secretly nailed, and the condition of the staircase. One of the parties
120 who was present took hold of the hand-rail and shook it to show how imperfectly the work had been done. No; I did not shake it myself. I really do not know anything more that I can state in a general manner.

The walls were sunk on the front of the warehouse down to the foundation. This was on Seventh street; and the walls of the main building adjoining the alley were also sunk. The sinking ran from the main building across to the north side of the alley, where the main sinking occurred. I did not notice that the arch of the alley was below the level of the pavement. I examined below the arch. The wall on Seventh street was cracked from the top to the foundation. The principal sinking of the wall was at the angle formed by the south wall of the warehouse, with the front wall of the warehouse on Seventh street. I do not know of anything else that I remember about it particularly.

5. Fifth interrogatory. Did you examine the windows on the Seventh street front, including the windows in the room over the alley where the front building united with the warehouse itself, and observe the effect of the settling and inclinations of the walls or the opening and shutting of the windows?

Answer to the fifth interrogatory. I did. The wall had sunk upon the front line of the warehouse on Seventh street down to the south wall of the warehouse, so that the windows were out of plum
130 at least from two and a half inches to three inches. I did not examine them except by the eye. Of course the greater sinking was next to the south wall of the warehouse, and there was a sinking of the room over the alley towards that point on Seventh street.

6. Sixth interrogatory. State the practical effect of the windows when brought down on the sill, whether the lower surface of the sash rested level on the sill, or came in contact with the sill only at one

side; and what space was there between the sash and sill on the side where they did not come in contact.

Answer to the sixth interrogatory. The sash was out of level to the extent that I have before said, at its deepest point towards the south wall. As you went up the line of the warehouse towards the north wall, it became less, because the principal sinking was at the south wall of the warehouse, and the angle formed by the front wall of the warehouse.

7. Seventh interrogatory. What appearance did this sinking and inclination of the walls from the plum line give the building on the outside? Were these defects plain and visible as far as the building could be seen, or were they hidden from view and observation?

Answer to the seventh interrogatory. They were very plain. They could be seen from the opposite side of the street, and after I
131 had seen the condition of the foundation I was unwilling to pass on that side of the street which the building fronted, from the apprehension that the wall would fall down, and I considered that it was dangerous to do so; and when I had occasion to pass up or down Seventh (7th) street I kept on the other side of the street to avoid it.

8. Eighth interrogatory. What was the general apprehension of persons who viewed the building as to its safety as a residence, or the danger of its falling?

(The above question is excepted to by the counsel of the complainant.)

Answer to the eighth interrogatory. The apprehension was that it was dangerous, and that it would fall. I believe now that it was dangerous, and if it had not been repaired it would have fallen.

9. Ninth interrogatory. Is it your opinion that the building, as complainant left it, was in tenantable condition; that is, whether good tenants could have been found to occupy it, or whether they would have been deterred by any apparent danger?

(The above question was excepted to by the counsel for the complainant.)

Answer to the ninth interrogatory. No; I do not think that
132 any sane person would have gone into it in its then condition.

CHRIS'R ANDREWS.

Subscribed and sworn to by said C. Andrews this 28th Jan'y, 1857, before me.

W. R. WOODWARD, *Comm'r.*

The further taking of depositions in the said cause was hereupon adjourned until to-morrow, Thursday, the 29th day of January, 1857, by consent.

THURSDAY, *January* 29, 1857.

Present: James M. Carlisle, on the part of the complainant, and General W. Jones, on the part of the defendant, and also the said Christopher Andrews, for his cross-examination.

And the said Christopher Andrews, on being cross-examined by the said complainant, doth, in answer to the following cross-interrogatories propounded to him by said complainant, depose and say as follows:

1. First cross-interrogatory. You say that you were one of the referees touching a controversy about the old building mentioned in your testimony in chief. By whom were you so appointed, and in what year, and who was the opposite party in that controversy?

Answer to the first cross-interrogatory. I said it was about the extra work about that building and the drains. I was appointed by Miss Dermott. It is more than I can determine now in what
133 year it was; it must have been in 1832 or 1833, I suppose. Hanson Gassaway was the opposite party.

2. Second cross-interrogatory. What was the thickness and what the height of the respective walls of the said old building?

Answer to the second interrogatory. I realy don't know; I never measured them.

3. Third cross-interrogatory. Was not the old building composed of a main building and a back building, and even these two parts of the building put up at the same time? And if not, state when they were respectively erected.

Answer to the third cross-interrogatory. I only recollect the main building.

4. Fourth cross-interrogatory. Is it your impression, then, that a building at least three stories high, and perhaps three stories above the stores, extended all the way to the alley?

Answer. No; I did not say that. My impression is that it was three stories above the pavement, and that it extended up the south side of the alley.

5. Fifth cross-interrogatory. Do you not remember that there
134 was a back building on 7th street, and that over the roof of it there were apparent some fireplaces on the outside of the north wall of the main building?

Answer to the fifth cross-interrogatory. I do not; I have no recollection of that. My attention was mainly to the front of the main building.

6. Sixth cross-interrogatory. Are you confident that the old building fronting on Market space was erected about the year 1832, and not earlier?

Answer to the sixth cross-interrogatory. I am not confident about the date at all.

7. Seventh cross-interrogatory. In what part of the old building was the alledged extra work, concerning which you were arbitrator or referee, and in which part were the drains you mentioned?

Answer to the seventh cross-interrogatory. I have told you I did not state that was about the main building. I do not recollect now in what particular part of the building they were. It was an account of about seventeen or eighteen hundred dollars. I did not examine the building at the time of the reference; and as to the drains, I did not examine them, the matters being laid before us by written statements and accounts of the parties.

8. Eighth cross-interrogatory. You have said that you ex
135 amined the old building preparatory to the contemplated improvements by defendant. Please to state what was the nature and what the extent of your examination.

Answer to eighth cross-interrogatory. I went throughout the whole building. She wanted me to go with her to see what improvements she could make to the building, and we went through the building with that view. I don't recollect going into the cellars; we went through above the ground. One went up to the highest part of the building.

Ninth cross-interrogatory. Was there an attic or garret?

Answer to the ninth cross-interrogatory. That is my impression.

10. Tenth cross-interrogatory. Did any part of the old building rest upon the place where you have described the sinking of the walls of the new building to have been greatest, to wit, the angle formed by the south wall of the warehouse and the wall of Seventh street?

Answer to tenth cross-interrogatory. I think not. My impression is that there were two shanties on the north side of the alley. The alley laid between the spot referred, that is, the angle spoken of and the old building.

136 11. Eleventh cross-interrogatory. When you accompanied the defendant, at her request, to see the complainant respecting the cornice, did you understand from her or from the complainant what objection he alleged against putting on a brick cornice?

Answer to eleventh cross-interrogatory. I understood from both that Mr. Jones suggested that it would be lighter, and that the brick cornice would not cost him any more, but that the wooden cornice would be lighter and better, and the wooden cornice would, if anything, cost him more than the brick one. I suggested, in answer to that, that the brick cornice would be more permanent and least liable to fire.

12. Twelfth cross-interrogatory. Did the complainant assign any, and what, reason for making the cornice lighter?

Answer to the twelfth cross-interrogatory. I don't recollect any.

13. Thirteenth cross-interrogatory. At that time had any cracks appeared in the walls?

Answer to the thirteenth cross-interrogatory. Not that I am aware of. I never heard of any until after the roof was on the house and that break took place on 7th street.

14. Fourteenth cross-interrogatory. Are you positive that the complainant did not assign as the reason for substituting the
137 wooden cornice, that he was apprehensive that the walls would be too heavy?

Answer to the fourteenth cross-interrogatory. I am positive that he made no such suggestion.

15. Fifteenth cross-interrogatory. Please to fix, as nearly as you can by reference to circumstances or otherwise, the date when you found the cellar flooded and "nothing but mud and water" and "the

foundations sobbed in water," as you say in answer to the 4th direct interrogatory?

Answer to the fifteenth cross-interrogatory. I could not give the precise date, but will state the circumstances connected with it. There were two occasions. The first was when Mr. Merensie and Mr. Andrews came on to examine the building, which was not long after the building was delivered over to her by Mr. Jones. The second occasion was after Mr. Merensie had undertaken to correct the defects of the building, and had taken up the floors and the pavement of the cellars. This was not long after the first occasion. The second occasion was, I think, in the following spring, and was, I think, somewhere between April and June. That is my impression, though I am not positive. The condition of the cellars and foundation referred to in the interrogatory was on the second occasion, and after Mr. Merensie had commenced the repairs. On the first oc-
138 casion the water was showing itself through the floor, and the floor was damp through; that is, portions of the floor, not the whole of the floor. It was on this first occasion that the brick was taken up, as stated by me in answer to the fourth direct interrogatory.

16. Sixteenth cross-interrogatory. Upon either of the two occasions referred had any part of the wall been taken down?

Answer to the sixteenth cross-interrogatory. I don't recollect as to that. I am mistaken. There was a portion of the inside walls on the top of the division walls taken down on the second occasion. It was on that occasion that the workman pointed out to me the crushed stone on which the pier had rested, as stated by me yesterday. I supposed when the interrogatory was first put to me that the outside walls were referred to.

17. Seventeenth cross-interrogatory. After the latter of these two occasions, when did you next visit that building, and what was the condition of the work at that time, and particularly of the cellars and the walls on 7th street?

Answer to the seventeenth cross-interrogatory. My next visit was to the best of my recollection, after the building was completed. I do not recollect of having again gone there until after Mr.
139 Merensie had finished the work. The building was then in good condition.

18. Eighteenth cross-interrogatory. Please to state in what parts of the building the floors were not secretly nailed, but the nails driven through the surface of the floor, as you have testified, or was this the case throughout the building; and when was it that you observed this?

Answer to the eighteenth cross-interrogatory. It was before Merensie commenced the work to rebuild it. I think it was the case generally throughout the building that the floors were not secretly nailed, but the nails driven through the surface of the floor, but more especially in the second story above the stores and the rooms of the first story above the stores north of the passage. It was in company with General Jones that I observed this, and it was after this Mr. Merensie came on to repair the building.

19. Nineteenth cross-interrogatory. Do you wish to be understood as stating positively that you observed that the floors of all the rooms in the second story above the stores were in the condition you have described; and in how many rooms were they so?

Answer to the nineteenth cross-interrogatory. We went through all the rooms. It was in those rooms especially fronting on Seventh
street, for they were the most important. We went through
140 the whole house, and it was especially in reference to those
rooms I have already mentioned fronting on 7th street that were in that condition. As to them I testify positively. I did not count the rooms. It is my impression that three four rooms on the second story and two below, which are the same I have referred to in my answer. I did not say "as to them I testify positively," but that such was my impression. I do testify positively as to the rooms I have mentioned, but I do not mean to say that I examined every nail and every plank.

20. Twentieth cross-interrogatory. Did you not visit the work, and if so, how frequently, while the complainant was constructing the house?

Answer to the twentieth cross-interrogatory. I went there, not on many occasions, at the request of Miss Dermott, on one occasion about the sand, another about the iron for the arch, and another about the cornice. I recollect those occasions and once afterwards when Mr. Jones had stopped the work, and they were conferring about the payment of the five thousand dollars.

21. Twenty-first cross-interrogatory. Did you on any of those occasions observe that the floors were rough and not secret nailed.

Answer to the twenty-first cross-interrogatory. No; the
141 house was not built at those times. On the last occasion I
have spoken of I went through the house but not in reference to the floors. It was more in reference to the sinking of the walls.

22. Twenty-second cross-interrogatory. Had the dispute about the five thousand dollars anything to do with the sinking of the walls?

Answer to the twenty-second cross-interrogatory. It had in reference to the condition of the house. The question was whether Mr. Jones would go on with the house without the payment of the five thousand dollars or not.

(The witness here desires to make a correction of his answer to the 21st cross-interrogatory. He desires to state that on the occasion of his visit to the house about the iron for the arch, the house was covered in.)

23. Twenty-third cross-interrogatory. Was the payment of the five thousand dollars refused upon any other ground than that the stores had not been completed on the first day of October?

Answer to the twenty-third cross-interrogatory. That was the case when that period—the first day of October—arrived. Afterwards it was refused upon the ground that the whole house was not completed and the contract was not fulfilled.

24. Twenty-fourth cross-interrogatory. But at the time referred to, when you say you went to the house and they were con-

142 ferring about that payment, was the payment refused on any other ground than that mentioned in the last question?

Answer to the twenty-fourth cross-interrogatory. At that time the ground of refusal was the failure to complete the stores on the first day of October.

25. Twenty-fifth cross-interrogatory. When was it that Mr. Jones had suspended the work, as stated in your answer to the 20th cross-interrogatory, and how long did it remain suspended, and for what alleged reason?

Answer to the twenty-fifth cross-interrogatory. That was on the fourth occasion when I visited house, referred to in my previous answer. The first occasion was about the sand, the second was about the cornice, the third about the iron for the arch, and the fourth time was in reference to the five-thousand dollar payment. I do not know how long it was suspended, nor for what alleged reason.

26. Twenty-sixth cross-interrogatory. What was the condition of the drains or sewers on the two occasions on which you have described the state of the cellar? Were they choked up or in operation?

Answer. Their condition was very bad, and they were choked up.

143 27. Twenty-seventh cross-interrogatory. Had there been heavy rains, and had not the drain or sewer belonging to Mr. Fowler's house immediately above broken away and flooded the defendant's cellar?

Answer to the twenty-seventh cross-interrogatory. I do not know anything about that.

CHRIS'R ANDREWS.

Subscribed and sworn to by said C. Andrews this 29 Jan'y, 1857, before me.

WM. R. WOODWARD,
Comm'r.

The further taking of the depositions was hereupon, Friday, January 30, 1857. Present: James M. Carlisle, esq., on the part of the complainant, and General Jones and John C. Brent, esq., on the part of the defendant, and the said Christopher Adams, the aforesaid witness.

The counsel on the part of the complainant hereupon announced that he had closed his cross-examination of the said Christopher Andrews.

And the said Christopher Andrews, on his re-examination in chief by the defendant, doth, in answer to the interrogatories in his re-examination, depose and say as follows:

1. First interrogatory on re-examination. On which side of the front building was the wall on which the piers you have mentioned rested, and which you have said had split or given way under

144 the piers?

Answer to the first interrogatory on re-examination. On the east wall of the area, which is on the west side of the building.

2. Second interrogatory on re-examination. Was that wall within or without the area of the west wall of the old building?

Answer to the second interrogatory on re-examination. It was within the west wall, east of N. of the old building extended that far back.

CHRIS'R ANDREWS.

Subscribed and sworn to by said C. Andrews this 30 Jan'y, 1857.
WM. R. WOODWARD,
Comm'r.

And said cause was regularly continued with the consent of said parties, and by order of the court, and is still pending and undecided.

Test :

JOHN A. SMITH, *Clk.*

DISTRICT OF COLUMBIA,
Washington County, to wit:

I, John A. Smith, clerk of the circuit court of the District of Columbia for the county of Washington, hereby certify that the
145 foregoing is a full, true, and perfect transcript of all the proceedings had in said court in the case of Zepheniah Jones against John P. Ingle, executor of Ann R. Dermott, taken from the records and minutes of said court.

In testimony whereof, I hereunto subscribe my name and affix the
[SEAL.] seal of said court this twenty-eighth day of November, A. D. 1862.

JNO. A. SMITH, *Clerk.*

Filed Nov. 29, 1862.

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SUPREME COURT OF THE UNITED STATES.

No. 70.

JOHN P. INGLE, EX'R OF ANN R. DERMOTT, DECEASED, PLAINTIFF IN ERROR,

vs.

ZEPHENIAH JONES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

GOVERNMENT PRINTING OFFICE.

1323

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"OLD RECORD."

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UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the District of Columbia, sitting for the county of Washington, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court before you, or some of you, between Zepheniah Jones, plaintiff, and Ann R. Dermott, defendant, a manifest error hath happened, to the great damage of the said defendant, as by her complaint appears: We being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, and that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, which of right, and according to the laws and custom of the United States, should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the said Supreme Court. Issued this 30th day of Nov., 1857.

JNO. A. SMITH,
Clerk Circ't Ct., Wash'n Co., Dist. of Col'a.

Filed 30th November, 1857.

Citation.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to Zepheniah Jones, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the circuit court of the District of Columbia for the county of Washington, wherein Ann R. Dermott is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said Ann R. Dermott, in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

2 Witness the Hon. James Dunlop, chief judge of the circuit court of the District of Columbia, the 30th day of November, 1857.

JAS. DUNLOP.

Served a copy of the within sum's on pl'ff's att'y this 30th of Nov., 1857.
J. D. HOOVER, *Marshal.*

Copy of appeal bond.

Know all men by these presents, that we, Ann R. Dermott, William J. McDonald, and Andrew Noerr, are held and firmly bound unto Zepheniah Jones, in the full and just sum of seventeen thousand dollars, lawful money, to which payment well and truly to be made and done we bind ourselves, and each of us,

our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this twenty-eighth day of November, 1857.

Whereas lately, at a circuit court of the District of Columbia, sitting for the county of Washington, in a suit pending in the said court, wherein the said Zepheniah Jones was plaintiff, and the said Ann R. Dermott was defendant, judgment was rendered against the said defendant; and she having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and citation directed to the said Zepheniah Jones, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Ann R. Dermott do and shall prosecute her said writ to effect, and answer all damages and costs if she fails to make her plea good, then the above obligation to be null and void, otherwise to be and remain in full force and virtue in law.

ANN R. DERMOTT. [SEAL.]
W. J. McDONALD. [SEAL.]
A. NOERR. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN CARROLL BRENT.
WILLIAM NOERR.

I hereby certify that from my knowledge of the property of William J. McDonald and Andrew Noerr, sureties in the foregoing appeal bond, I believe to be ample.

JOHN CARROLL BRENT.

Approved by the court.
True copy.
Test: JNO. A. SMITH, *Clk.*

3 *Style of court.*

DISTRICT OF COLUMBIA, *to wit:*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the third Monday of October, being the nineteenth day of the same month, in the year eighteen hundred and fifty-seven, and of the independence of the United States the eighty-second.

Present, James Dunlop, chief judge; the hon'ble James S. Morsell and Wm. M. Merrick, ass't judges; Jonah D. Hoover, esq., marshal.

JOHN A. SMITH, *Clerk.*

In the records of proceedings of said court, amongst others are the following, to wit:

Parties.

ZEPHENIAH JONES
vs.
ANN R. DERMOTT.

Be it remembered that heretofore, to wit, on the thirteenth day of July, in the year eighteen hundred and fifty-two, the said plaintiff, by Bradley & Carlisle, esqs., his attorneys, prosecuted and sued forth out of the circuit court here the United States writ of capias ad respondendum, directed to the marshal of the District of Columbia, in the words and of the tenor following, to wit:

Capias ad Resp'm.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to the marshal of the District of Columbia, greeting:

You are hereby commanded to take the body of Ann R. Dermott, late of Washington county, if she shall be found within the county of Washington, in your said District, and her safely keep, so that you have her body before the circuit court of the District of Columbia, to be held for the county aforesaid, at the city of Washington, on the third Monday of October next, to answer unto Zepheniah Jones, in a plea of debt, and so forth.

Hereof fail not at your peril, and have you then and there this writ.

Witness W. Cranch, esq., chief judge of our said court, in the city of Washington, the 22d day of May, anno Domini one thousand eight hundred and fifty-two.

Issued the 13th day of July, 1852.

JOHN A. SMITH, *Clk.*

BRADLEY & CARLISLE.

4 October term, 1850.

At which mentioned third Monday of October, in the year eighteen hundred and fifty-two, and the day of the return of the foregoing writ, come again into the circuit court here the said plaintiff, by his attorneys aforesaid, and the marshal of the District of Columbia, to whom the said writ was in form aforesaid directed, makes return thereof to the court here, thus endorsed, to wit: "Non est."

R. WALLACH, *Marshal.*

Thereupon, afterwards, to wit, on the nineteenth day of October, in the year eighteen hundred and fifty-two, the said plaintiff, by his attorneys aforesaid, prosecuted and sued forth out of the circut court here an alias United States writ of capias ad respondendum, directed to the marshal of the District of Columbia, in the words and of the tenor following, to wit:

Alias capias.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to the marshal of the District of Columbia, greeting:

We command you that you summon Ann R. Dermott, late of Washington county, if she shall be found within the county of Washington, in your said District, and her safely keep, so that you have her body before the circuit court of the District of Columbia, to be held for the county of Washington, at the city of Washington, on the fourth Monday of March next, to answer unto Zephenia Jones, in a plea of debt, and so forth.

Hereof fail not at your peril, and have you then and there this writ.

Witness W. Cranch, esquire, chief judge of our said court, at the city of Washington, the 18th day of October, anno Domini one thousand eight hundred and fifty-two.

Issued the 19th day of October, 1852.

JOHN A. SMITH, *Clk.*

BRADLEY & CARLISLE.

Marshal's return and defendant's appearance.—Rule nar.

March term, 1853.

At which mentioned fourth Monday of March, in the year eighteen hundred and fifty-three, and the day of the return of the aforegoing writ, comes again into the circuit court here the said plaintiff, by his attorneys aforesaid, and the marshal of the District aforesaid, to whom the said aforegoing writ was
5 in form aforesaid directed, makes return thereof to the court here, thereon endorsed, to wit: "Summoned."

R. WALLACH, *Marshal.*

And the said defendant being called, appears in court here, by John Carroll Brent, esq., her attorney; and thereupon, on motion of the said defendant by her attorney aforesaid, it is ruled by the court here that the said plaintiff declare against the said defendant in the plea aforesaid, or judgment by the court here will be entered against him in default thereof; and thereupon the said plaintiff, by his attorneys aforesaid, pray leave of the court here to imparle until the third Monday of October next, and then to declare against the said defendant in the plea aforesaid, and to him it is granted. The same day is given to the said defendant also.

Appearance and imparlance to March term, 1854.

October term, 1853.

At which said third Monday of October, in the year eighteen hundred and fifty-three, to which said day the said plaintiff had leave to imparle, and then to declare against the said defendant in the plea aforesaid, comes again into the circuit court here, as well the said plaintiff, by his attorneys aforesaid, as the said defendant, by her attorney aforesaid, and the said plaintiff, by his attorneys aforesaid, pray leave of the court here further to imparle until the fourth Monday of March next, and then to declare against the said defendant in the plea aforesaid, and to him it is granted. The same day is given to the said defendant also.

At which mentioned fourth Monday of March, in the year of our Lord one thousand eight hundred and fifty-four, to which said day the said defendant had leave to imparle, and then to answer the declaration aforesaid of the said plaintiff in the plea aforesaid, come again into the circuit court here, as well the said plaintiff, by his attorney aforesaid, as the said defendant, by her attorney aforesaid; whereupon, on motion of the said defendant, by her attorney aforesaid, the court made the following order, to wit:

Order that the def't elect between the suit at law and bill in chancery, and dismiss either the suit at law, or so much of the bill in ch'y as goes for the $5,000.

ZEPHENIA JONES *vs.* ANN R. DERMOTT. } 319.—Trials, Mar., 1854.

SAME *vs.* SAME. } No. 923.—Bill in equity.

On motion of the defendant, ordered that the plaintiff elect, during
6 the present term of this court, between the said suit at common law and the said bill in chancery, and dismiss either the said suit at common

law, or so much of the said bill in chancery as goes for the $5,000 and int. therein claimed, as payable by the terms of the contract, under seal, exhibited with said bill on the 1st October, 1851.

By order of the court.

Test: JNO. A. SMITH, *Cl'k*.

Continuance to October term, 1854.

1st May, 1854.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, by their attorneys aforesaid, and by order of the court here the said cause is continued until the third Monday of October next.

Appearance and continuance to Mar. term, 1855.

At which mentioned third Monday of October, in the year eighteen hundred and fifty-four, come again into the said court here, as well the said plaintiff, by his attorneys aforesaid, as the said defendant, by her attorney aforesaid; thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here the said cause is further continued until the fourth Monday of March next.

Appearance and continuance to October term, 1855.

At which mentioned fourth Monday of March, in the year of our Lord one thousand eight hundred and fifty-five, comes again into the circuit court here, as well the said plaintiff, by his attorney aforesaid, as the said defendant, by her attorney aforesaid; thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here the said cause is further continued until the third Monday of October next.

At which mentioned third Monday of October, in the year of our Lord one thousand eight hundred and fifty-five, comes again into the circuit court here as well the said plaintiff, by his attorney aforesaid, as the said defendant, by her attorney aforesaid; and thereupon the said plaintiff, by his attorneys aforesaid, to wit, on the 25th January, 1856, declared against the said defendant in the plea aforesaid, in form following, to wit:

Nar.

DISTRICT OF COLUMBIA,
Washington County, to wit:

Ann R. Dermott, spinster, was summoned to answer unto Zepheniah Jones, in a plea of debt.

7 Whereupon the said plaintiff, by Bradley and Carlisle, his attorneys, complain, for that whereas the said Ann R. Dermott, at the county aforesaid, on the first day of July, 1852, was indebted to the said Zepheniah Jones in the sum of five thousand for the price and value of certain work and labor done and materials furnished by the said Zepheniah to the said Ann R., and used and employed by her in and about the erection of certain buildings, and finishing and completing certain stores in said buildings, for said defendant, in the city of Washington and county aforesaid, at her request.

And in a like sum of money, for so much money paid by the plaintiff for the use of the defendant, and at her request.

And in a like sum of money, for so much money had and received by the defendant for the use of the plaintiff.

And in a like sum of money by the said plaintiff paid, laid out, and expended for the use of the defendant, and at her request.

Whereby and by reason whereof, and by reason of the non-payment thereof to the plaintiff on his request, an action hath accrued to the plaintiff to demand and have of the defendant the said sum of money above mentioned.

Yet the defendant has not paid the same, or any part thereof, although the same has been repeatedly demanded of her by the said plaintiff, to the damage of the plaintiff ten thousand dollars, and therefore he sues.

BRADLEY & CARLISLE,
Pl'ff's Att'ys.

Rule bill of particulars.

Whereupon, on motion of the said defendant, by her attorney aforesaid, it is ruled by the court here that the said plaintiff file in this cause an account or bill of particulars.

And the said plaintiff, by his attorneys aforesaid, file in court here the following bill of particulars of work done, including the materials furnished, by Z. Jones, in the erection of Ann R. Dermott's house, at the corner of Market Space and 7th street west, up to the 1st day of October, 1851.

Bill particulars.

1,478 cubic yds. excavation, *a* 20 c.	$285 60		
223½ perches of stone foundation, *a* $3	670 50		
549 625/1000 brick work and materials, *a* $13	7,145 12		
738 sq. yds. stone paving, *a* 45 c.	332 10		
333 yds. of brick paving, *a* 55 c.	181 50		
169 feet, lineal, of moulded brick cornice, *a* 150 c.	253 50		
		$8,862 32	
208 3/12 feet, lineal, granite curbstone, *a* 85 c.	176 87		
8 148 3/4 feet, lineal, 8 x 12 granite coping, *a* 190 c.	281 67		
65 feet, lineal, granite water table, *a* 125 c.	81 25		
160 7/12 feet, lineal, granite window sills, *a* 63 c.	104 38		
386 feet, sup'l, granite stone sills, *a* 65 c.	240 90		
565 feet, lineal, of mantle heads and sills, *a* 100 c.	565 00		
3½ feet granite lintel, *a* 65 c., 2 27½; 2 plinth columns, 10 40	12 67½		
1 shop stone, 2 66; 2 gutters anti, 6 00	8 86		
67 7/12 N. Riv. sills and coping, *a* 30c.	20 27		
		1,491 67½	
31,662 feet N. Carolina joisting and flooring, *a* 16 c.	5,065 92		
6,940 feet N. Carolina ceiling joist, *a* 5 c.	347 00		
6,543 feet roofing, including slate and tin, *a* 18 c.	1,177 74		
9,500 feet studded partition, *a* 2½ c.	237 50		
296 feet trussed back wall to warehouse, sheathed and covered with tin, *a* 22 c.	65 21		
78 feet sup'l, trussed and bolted gutters to roof, *a* 15 c.	11 70		
122 windows and door-frames, including the sash, blinds, outside doors, and spleyed jambs, *a* $15	1,830 00		
60 inside door jambs, trimmed ready for plastering, *a* $3	180 00		
65 risers to geometrical staircase, *a* $5	325 00		
90 risers to back stairs, *a* $2	180 00		
28 risers to stairs descending to cellar stairs, *a* $2½	70 00		

180 of skylight sash, *a* 20 c., $36 00; 300 ft. partels to do., *a* 7 c., $21 00	$57 00		
243 feet, superficial, of reservoir lined with sheet-lead, *a* 55 c	133 65		
120 feet 5 x 5 N. C. clothes posts, dressed on roof, *a* 15 c	18 00		
		$10, 359 99½	
Carpenters' work, lumber, and hardware furnished	9, 698 63		
650 ft. sup'l of stone fronts and doors and sash and shutters, *a* $1	650 00		
514 feet of balcony floors laid, *a* 15 c	77 10		
		10, 425 73	
9 27, 640 lbs. of casting for girders, columns, store fronts, &c., *a* 3 c	829 20		
5 cast-iron cylinders for vaults	11 20		
725 ft. of wrought-iron brackets for balconies, *a* 10 c.	72 50		
		912 90	
595 ft. of largest class of tin gutter and spout, *a* 20 c		119 00	
167 yds. of 4-coat painting to brick cornice, *a* 37 c.	61 79		
1, 391 yds. of one-coat painting, *a* 7 c	97 37		
26 yds. of 3-coat painting, *a* 20 c	5 20		
		164 36	
786 yds. finished plastering, *a* 25 c	196 50		
4, 524 yds. of lathing and one coat painting, *a* 9 c	407 16		
		603 66	

Rule plea.

Whereupon, on motion of the plaintiff, by his attorneys aforesaid, it is ruled by the court here, that the said defendant answer to the declaration aforesaid of the plaintiff in the plea aforesaid at the next March term of the said court, or judgment by the court here will be rendered against her in default thereof.

Thereupon the defendant, by her attorney aforesaid, defends the force and injury, when, and so forth, and prays leave of the court here to imparle until the fourth Monday of March next, and then to answer to the declaration aforesaid of the said plaintiff in the plea aforesaid; and to her it is granted. The same day is given to the said plaintiff, then and there, and so forth.

Mar. term, 1856.

At which mentioned fourth Monday of March, in the year eighteen hundred and fifty-six, come again into the circuit court here, as well the said plaintiff, by his attorneys aforesaid, as the said defendant, by her said attorney; whereupon the said defendant, by her attorney aforesaid, submits to the court here the following motion, to wit:

2d rule in pl'ff to elect, &c., &c.

ZEPHENIAH JONES *vs.* ANN R. DERMOTT. } No. 129.—Trials March term, 1856.

SAME *vs.* SAME. } No. 923.—Bill in Chancery.

The defendant in the aforesaid cases now here submits to the court this her motion for a rule in plaintiff to elect, during the present term, between
10 his said action of debt, pending on the common-law side of this court

against this defendant, and his said bill pending on the equity side of this court against the said defendant, as to the sum of money, to wit, $14,000 with interest, for which a decree is prayed against said defendant by plaintiff in his said bill.

WALTER JONES, *for Def't.*

28 April, 1856.

Pl'ff elects to recover only $5,000, *mentioned in bill in ch'y.*

Whereupon the said plaintiff, by his attorneys aforesaid, filed in court here the following answer to the motion aforesaid of the said defendant, to wit:

ZEPHENIAH JONES *vs.* ANN R. DERMOTT. } No. 129.—Trials March term, 1856.

In answer to a motion this day made by the defendant in the above entitled action to elect, &c.:

The plaintiff says, he elects to recover in this action only the $5,000 mentioned in his said bill in equity, to be paid by defendant on the completion of the said stores and warehouse in said bill mentioned and claimed on the 1st October, 1851, with interest, and hereby disclaims all and every right or pretension in this cause to recover any portion of said $14,000.

Order of court dismissing bill in chancery, quo ad the $5,000.

Whereupon the court made the following order, to wit:

The plaintiff having made his election under the said order or rule made at March term, 1854, as aforesaid, to prosecute this action of debt for the recovery of the said sum of $5,000:

It is further ordered by the court, that the said bill in chancery be dismissed, and the same is dismissed accordingly, quo ad the said $5,000.

By order of the court. Test:

JNO. A. SMITH, *Clerk.*

29th April, 1856.

Pleas by defendant.

1st plea.

1. And the said defendant, by W. Jones and J. Brent, her attorneys, comes and defends the wrong and injury, when, &c., and says, that she does not owe the said sums of money above mentioned, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against her, and of this the said defendant puts herself upon the country, &c.

2d plea.

2. And for further plea in this behalf, as to the said first count of the said declaration—that is to say, as to so much of the said declaration as de-
11 mands the sum of five thousand dollars for the price and value of certain work and labor done and materials furnished by the said plaintiff to the said defendant, and used and employed by her in and about the erection of certain buildings, and finishing and completing of certain stores in the said buildings, for the said defendant—the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against her, because she says that whereas heretofore, to wit, on the 22d day of April, in the year 1851, at the county of Washington, in the District aforesaid, by certain articles of agreement then and

there made, concluded, and agreed upon between the said plaintiff, by the name and description of Zepheniah Jones, of the city of Washington, mason and house-builder, of the one part, and the said defendant, by the name and description of Ann R. Dermott, of the same city, of the other part, sealed with the respective seals of the said plaintiff and defendant, the date whereof is the same day and year aforesaid, the said parties did covenant and agree together, each with the other, that he the said plaintiff should and would well and faithfully do, perform, and execute, in good, substantial, and workmanlike manner, and in a neat style of finish, such as is proper to the sort and kind of work in its various details, all and singular the houses, buildings, and work of every sort and kind described and specified in a certain schedule to the said articles annexed, marked A, (copied in page 137,) and which, together with all its appendages and details, was to be taken and regarded as part and parcel of the said articles, comprehending all the work and labor of every sort necessary and proper for the pulling down and removal of the houses and buildings standing, or lately standing, on the lot referred to in said schedule, and for the removal and clearing off all the old materials and rubbish, and for the rebuilding and completion of the new houses and buildings to be erected on said lot, according to the specifications of said schedule; that he the said plaintiff would also procure and supply, or cause to be supplied and procured, all and singular the materials, implements, fixtures, matters and things requisite and proper for the execution of the said work in all its parts and details, and for the complete fitting for use and occupation of all the houses and buildings, and the several apartments of the houses and buildings to be erected pursuant to the plan of the works described and specified in said schedule; that the said work and works, and the several parcels and parts thereof, shall be executed, finished, and ready for use and occupation, and be delivered over, so finished and ready for use and occupation, at the time and times following, that is to say: the three stores described in said schedule as fronting on Market space, and the warehouse on 7th street, on or before
12 the first day of October then next ensuing, and all the residue of the said work on or before the first day of December then next ensuing. That the said defendant, in consideration of the covenants and agreements on the part and behalf the said plaintiff to be performed and executed as aforesaid, and of the due performance and execution of the same, and in full payment and satisfaction for all the work and labor aforesaid, and for all the materials, implements, fixtures, &c., to be by him procured and supplied as aforesaid, should well and truly pay him the full and just sum of twenty-four thousand dollars, by the instalments and at the time and times following, that is to say: five thousand dollars on the first day of July then next ensuing, the further sum of five thousand dollars on the first day of October then next ensuing, the said stores and warehouse being then executed, finished, and ready for use and occupation, and delivered over as above mentioned and agreed on; and the residue of the said sum of twenty-four thousand dollars, to wit, fourteen thousand dollars, on the first day of January, A. D. 1860, with interest as follows, that is to say: four thousand dollars, part thereof bearing interest from the first day of May then next ensuing, and the residue from and after the complete execution, finish, and delivery of the said work on the first day of December then next ensuing, and all such interest shall be paid quarter-yearly, that is to say: one-fourth part of the yearly interest shall be paid at the expiration of every quarter of a year, from and after the time when the same shall have begun to run; that on the complete execution, finish, and delivery of said work on the first day of December as aforesaid, she, the said defendant, should give her bond to the said plaintiff for the due payment of the said sum of fourteen thousand dollars, payable on the first day of January, in the year 1860, and the interest payable as aforesaid; and shall also give collateral security for the same in and by a deed of trust upon the property on which the said plaintiff had agreed to execute the works

specified in said schedule as aforesaid, in which deed there should be inserted among the other matters usual and proper in such instruments, a clause empowering and requiring the trustee in such deed named to collect and receive from any tenant or tenants of the said premises every such portion and instalment of said interest as shall be and remain unpaid and in arrears for the space of twenty days after demand and refusal of the same; and, as a still further security for the said sum of money and interest, that the same shall constitute and remain a good and valid lien on all the said property, according to the provisions of the act of Congress in such cases provided; but no such lien shall exist, or be or inure to the benefit of any person or persons whatsoever, other than said plaintiff, his executors and administrators, under any pretence of work and labor done, or materials supplied by his procurement, for the execution of his contract and agreement aforesaid; and he shall make all his contracts for such work,
13 labor and materials, on his own individual and personal account and credit, and so as to forefend all claims on the part of any person but himself to any lien or liens on said property, as by the said articles of agreement, and the said schedule, reference being thereunto had, will (amongst other things) more fully and at large appear, (copied in page 137,) which said articles, together with said schedule, being parcel thereof as aforesaid, the said defendant brings here into court; and the said defendant, protesting that the said plaintiff did not at any time or times whatever well and truly observe, keep, fulfil, or perform the said covenants, conditions, and agreements on his part and behalf to be observed, kept, fulfilled, and performed, or any or either of them, according to the tenor and effect, true intent and meaning of the said articles, says, nevertheless, that the said sum of $5,000 demanded by the said plaintiff in the said court as the price and value of the work, labor, materials, buildings, and stores therein mentioned, is the same identical instalment of five thousand dollars (being parcel of the entire price of $24,000 in the said articles mentioned) which the defendant, in and by the said articles, covenanted and agreed to pay to the plaintiff on the first day of October next ensuing the date of the said articles, upon the condition therein appearing, and was always, as well before as after the beginning of this suit, and yet is, in fact, claimed and demanded by the said plaintiff of the said defendant as and for such instalment, and as due and owing from said defendant to said plaintiff by the terms, force and effect of the said articles of agreement; without this, that the said work and labor, materials, buildings and stores, in the said first count mentioned were done, furnished, or erected, or that any claim or demand for the said sum of $5,000 therein demanded, or for any part thereof, had or at any time or times whatsoever before the bringing of this suit accrued to *to* the said plaintiff against the said defendant by reason or in the execution of any contract or agreement whatsoever between the said plaintiff and the said defendant other than or different from the articles of agreement made and concluded between said plaintiff and said defendant in manner and form aforesaid, or for any consideration or on any account whatsoever other than the identical consideration and the said instalment of the identical consideration therein covenanted and agreed on the part and behalf of said defendant to be paid to the said plaintiff in full payment and satisfaction for all the work and labor on the part and behalf of said plaintiff, therein covenanted and agreed to be done and performed as aforesaid, and for all the materials, implements, fixtures, &c., on his part therein covenanted and agreed to be by him procured and supplied as aforesaid; and this the said defendant is ready to verify; wherefore she prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against her, &c.

14 3d plea.

And for a further plea in the said first count of the said declaration, the said defendant, by like leave of the court here for this purpose first had and

obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against her, because, referring to the said articles of agreement in her said second plea above mentioned, and therein recited and set forth as aforesaid, and to the said schedule thereto annexed as aforesaid, all of which she prays may be taken and regarded as part and parcel of this her plea, in like manner as if the same had been herein again recited and set forth, and again made profert of; and also referring to all such of the statements and averments in the said plea contained and set forth, as go to aver and show the absolute identity of the said sum of $5,000 demanded by the said plaintiff in the said first count of his declaration, and of the consideration, cause and grounds of such demand set forth in the said count, with the said instalment of $5,000, in and by the said articles covenanted and agreed on the part and behalf of the said defendant to be paid to the said plaintiff on the said first day of October then next ensuing the date of said articles, upon the condition therein appearing, and with the consideration, cause and grounds expressed in the said articles for the payment of said instalment, which identity she now again affirms and avers, says that though she did well and truly fulfil and perform the said articles of agreement in all things on her part and behalf to be fulfilled and performed, according to the tenor and effect, true intent and meaning of said articles, yet the said plaintiff failed, neglected and refused to fulfil and perform the covenants and agreements on his part and behalf to be fulfilled and performed according to the tenor and effect, true intent and meaning of the said articles, and, among other such failures, neglects and refusals, that the said three stores and the warehouse in the said articles, and in the said schedule mentioned, described and specified, were not executed, finished and ready for use and occupation, and delivered over, so executed, finished and ready, to said defendant, either on or at any time before the said first day of October then next ensuing the date of said articles, but that the said plaintiff utterly failed, neglected and refused so to execute, finish, make ready and deliver over the said stores and warehouse; and this the said defendant is ready to verify; wherefore she prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against her, &c.

4th plea.

And for a further plea to the said first count of the said declaration, the said defendant, by like leave of the court here for this purpose first had and
15 obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against her, because the said defendant, referring to the said articles of agreement in her said second plea above mentioned, and therein recited and set forth as aforesaid, and to the said schedule thereto annexed as aforesaid, all of which she prays may be taken and regarded as part and parcel of this her plea, in like manner as if the same had been herein again recited and set forth, and again made profert of; and also referring to all such of the statements and averments in her said plea contained and set forth, as go to aver and show the absolute identity of the said sum of $5,000 demanded by the said plaintiff in the said first count of his declaration, and of the consideration, cause and grounds of such demand set forth in the said count, with the said instalment of $5,000, in and by the said articles covenanted and agreed on the part and behalf of the said defendant to be paid to the said plaintiff on the said first day of October then next ensuing the date of said articles, upon the consideration therein appearing, and with the consideration, cause and grounds expressed in the said articles for the payment of said instalment, which identity she now again affirms and avers, says that though she did well and truly fulfil and perform the said articles of agreement in all things on her part and behalf to be fulfilled and performed, according to the tenor and effect, true intent and mean-

ing of the said articles, yet the said plaintiff failed, neglected and refused to fulfil and perform the covenants and agreements on his part and behalf to be fulfilled and performed according to the tenor and effect, true intent and meaning of the said articles; and, among other such failures, neglects and refusals, that the said three stores and the warehouse, in the said articles and schedule mentioned, described and specified, never were, either on the said first day of October next ensuing the date of said articles, or at any time whatsoever before or after that day, executed, finished and ready for use and occupation, and delivered over, so finished and ready, to the said defendant; but that the said plaintiff utterly failed and refused so to execute, finish, make ready for use and occupation, and deliver over the same at any time or times whatsoever; and this the said defendant is ready to verify; wherefore she prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against her, &c.

JONES & BRENT, *for Def't.*

Leave to amend nar.

Whereupon the said plaintiff, at March term, 1856, being the 30th day of June, 1856, by his attorney aforesaid, prays leave of the court here to amend the nar filed in the said cause; which being granted, he filed in court here the following amended nar, to wit:

16 *Amended nar.*

ZEPHENIAH JONES }
vs.
ANN R. DERMOTT. }

DISTRICT OF COLUMBIA, *Washington County, to wit:*

1st count. Ann R. Dermott, late of the county aforesaid, was summoned to answer unto Zepheniah Jones, in a plea that she render unto the said Zepheniah Jones the sum of ten thousand dollars, which to the said Zepheniah she owes, and from him unjustly detains.

And whereupon the said plaintiff, by Bradley and Carlisle, his attorneys, complains, for that whereas heretofore, to wit, on the 22d day of April, in the year 1851, at the county aforesaid, by certain articles of agreement then and there made between the said plaintiff, by the name and description of Zepheniah Jones, of the city of Washington, in the District of Columbia, mason and house-builder, of the one part, and the said defendant, by the name and description of Ann R. Dermott, of the same city, of the other part, (one part of which said articles of agreement, sealed with the seal of the said defendant, the said plaintiff now brings here into court,) the date whereof is the day and year aforesaid, in consideration that the said plaintiff thereby agreed well and faithfully to do, perform and execute in good, substantial and workmanlike manner, and in a neat style of finish, such as is proper to the sort and kind of work in its various details, all and singular the houses, buildings and work of every sort and kind, and described and specified in a certain schedule to the said articles annexed, and marked A, (copied in page 137,) and which was to be taken and regarded as part and parcel of the said articles, comprehending all the work and labor of every sort necessary and proper for the pulling down and removal of the houses and buildings then standing, or lately standing, on the lot referred to in said schedule, and for the removal and clearing off the old materials and rubbish, and for the rebuilding and completion of the new houses and buildings to be erected on said lot, according to the specifications of said schedule: and further, to procure and supply, or cause to be supplied and procured, all and singular the materials, implements, fixtures, matters and things requisite and proper for the execution of the said work in all its parts and details, and for the

complete fitting for use and occupation of all the houses and buildings, and the several apartments of the houses and buildings, to be erected pursuant to the plan of the works described and specified in said schedule: and further agreed that the said work and works and the several parcels and parts thereof should be executed and finished and ready for use and occupation at the time
17 and times following, that is to say, the three stores described in said schedule as fronting on Market space, and the warehouses on Seventh street, on or before the first day of October then next ensuing, and all the residue of the said work on or before the first day of December then next ensuing. The said defendant thereby agrees and bound herself to the said plaintiff, well and truly to pay him the full and just sum of twenty-four thousand dollars, ($24,000,) by the instalment and at the time and times following, that is to say: five thousand dollars on the first day of July then next ensuing; the further sum of five thousand dollars ($5,000) on the first day of October then next ensuing, the said stores and warehouse being then executed, finished and ready for use and occupation, and delivered over as above mentioned; and the residue of the said sum of twenty-five thousand dollars, to wit, fourteen thousand dollars on the first day of January, A. D. 1860, with interest and with security, as in and by the said articles, brought into court as aforesaid, more fully and at large appears.

And the said plaintiff in fact saith that he did in all things well and faithfully fulfil and perform the said agreement on his part, according to the terms, true intent and meaning of the said agreement, and that the said sum of five thousand dollars, secondly above mentioned, became and was due and payable to him, the said plaintiff, by her, the said defendant, according to the tenor and effect of the said agreement, to wit, on the first day of October, in the year 1851, at the county aforesaid; yet the said defendant the said sum of money, or any part thereof, to the plaintiff hath not paid, but the same, or any part thereof, to pay wholly neglected and refused, to wit, on the day and year aforesaid, at the county aforesaid, contrary to the tenor and effect of the said agreement, whereby an action hath accrued to the said plaintiff, to demand and have of the said defendant the said sum of five thousand dollars, above demanded; but the said defendant, although often requested, hath not paid the said sum of money to the plaintiff, or any part thereof, but hath hitherto neglected and refused, and still neglects and refuses so to do, to the damage of the plaintiff ten thousand dollars.

2d count. (In all respects as the first, down to the averment of performance by the plaintiff, then as follows:)

And the said plaintiff in fact saith that he did on his part faithfully perform all things in the said agreement stipulated to be done and performed, according to the true intent and meaning of the said agreement; and did in fact do and perform all the work and labor, and procure and supply all the materials and implements, and other matters and things whatsoever stipulated in and by the said agreement to be done, performed, procured, furnished or supplied by him in the premises; but that the said defendant departed from the terms
18 and stipulations of the said agreement, and required the said plaintiff to do and perform additional work and labor, and to procure and furnish additional materials over and above the work, labor and materials so as aforesaid by him agreed to be done, performed, procured and furnished in the premises, whereby the said defendant delayed and hindered the said plaintiff in the premises, and, in fact, prevented him from having the said stores and warehouse executed, finished, and ready for use and occupation and delivered over to the said defendant on or before the said first day of October, as the said plaintiff was ready and willing to do, and would have done, but for the said departure by the said defendant from the stipulations of the said agreement, and the additional work, labor and materials so as aforesaid by her required in

the premises. And the said plaintiff in fact saith that, nevertheless, he did in fact execute and finish the said stores and warehouse, ready for use and occupation, and did deliver the same over to the said defendant, executed, finished, and ready for use and occupation, and the same were, in fact, so accepted and received by the said defendant, and used, occupied and enjoyed by her within due and reasonable time after the said first day of October, to wit, on the fourth day of December, in the year eighteen hundred and fifty-one, at the county aforesaid; and that the said sum of five thousand dollars, secondly above in this count mentioned, became and was due and payable to him by the said defendant, to wit, on the day and year last aforesaid, at the county aforesaid, whereby an action accrued to the said plaintiff to demand and have of the said defendant the said sum of five thousand dollars, above demanded. Yet the said defendant, though often requested, to wit, &c., the said sum, or any part thereof, hath not paid, but the same, or any part thereof, to pay hath hitherto refused, and still refuses, to the damage of the plaintiff ten thousand dollars.

3d count.

3d count. And whereas also the said Ann R. Dermott, at the county aforesaid, on the first day of July, 1852, was indebted to the said Zepheniah Jones in the sum of five thousand dollars, for the price and value of certain work and labor done, and materials furnished by the said Zepheniah Jones to the said Ann R., and used, employed by her in and about the erection of certain buildings, and finishing and completing certain stores in said buildings for the said defendant, in the city of Washington and county aforesaid, at her request;

And in a like sum of money, for so much money paid by the plaintiff for the use of the defendant, and at her request;

And in a like sum of money, for so much money had and received by the defendant for the use of the plaintiff, and for a like sum of money by
19 the said plaintiff paid, laid out and expended for the use of the defendant and at her request, whereby and by reason whereof, and by reason of the non-payment thereof to the plaintiff on his request, an action hath accrued to the plaintiff to demand and have of the defendant the said sum of money above mentioned; yet the defendant has not paid the same or any part thereof, although the same has been repeatedly demanded of her by the said plaintiff, to the damage of the plaintiff ten thousand dollars, and therefore he sues.

4th count.

4th count. And for that whereas also the defendant, heretofore, to wit, on the day and year last aforesaid, at the county aforesaid, was indebted unto the said plaintiff in the sum of ten thousand dollars for work and labor done and performed, and for materials furnished by the plaintiff for the defendant, at her special instance and request, and in the further sum of ten thousand dollars for money laid out and expended by the plaintiff to the use of the defendant, at her special instance and request, to be paid to the plaintiff by the defendant when she, the said defendant, should be thereto afterwards requested, whereby, and by reason of the said last mentioned sums of money being and remaining wholly unpaid, an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sums of money in this count above demanded; yet the said defendant, although often thereto requested, to wit, &c., the said sums of money, or either of them, or any part thereof, hath not paid, but the same, or any part thereof, to pay hath hitherto refused and still refuses, to the damage of the plaintiff ten thousand dollars, and therefore he brings suit, &c.

BRADLEY & CARLISLE, *for Pl'ff.*

NOTE.—A bill of particulars of the work, &c., mentioned in this count, is

herewith filed, the same being for the stores and warehouse, and for extra work, &c., beyond the contract.

ANN R. DERMOTT
To Z. JONES.....DR.

To 202 ft. lineal of dressed, $\frac{4}{5}$ rails to clothes-posts on roof, 8 c...	$16	16
" 71½ ft. (sup.) balcony frame and floor leading to roof, 15 c....	10	75
" 24½ ft. (lineal) of iron railing to do., and painting, $2 30....	56	16
" 5 heavy wrought iron brackets furnished and put up to do., $4 50.....	22	50
" 7⅔ feet of extension of door frame for a transom over the door leading to balcony, 5th story, and painting, 22 c.....	1	68
20 To 3 lights 11 x 23 sash and glass, and glazing and painting to do., 87½.....	2	62½
To 40 ft. (superficial) of opened and rabbeted door jambs, extended for extra transoms over doors, and painting do., 35 c.....	14	00
" 37⅓ ft. (lineal) of narrow door jambs extended for extra transoms, and painting do., 16 c.....	5	97
" 80 ft. (lineal) transom rail, rabbeted and bedded, casings to edges and painting of do., for extra transom, 25 c.....	20	00
" 138⅔ ft. (lineal) of architraves to extra transoms, and painting, 14 c.....	19	41
" 26 lights of transom sash 13 x 31, including the glass and painting, $1 75.....	45	50
" 52 pivots to extra transoms, 10 c.....	5	20
" 25 ft. sup. of platform, from head of stairs to the doors at balcony, 5th story, including the plastering to ceiling, 20 c.....	5	00
" 1 extra newel post, turning and painting of do.....	1	00
" 5⅙ ft. of facias, and noing and painting of do., 28 c.....	1	44
" 5⅙ " mahogany hand rail and ballusters, and painting do., $1 20	6	20
" 175 ft. of stud partition and plastering to do., occasioned by altering the back staircase, at 6 c. per foot.....	10	50
" 1,187 ft. (sup.) battening to west wall, by direction of Miss Dermott, including the value of the lathing to do., 3½ c.....	41	54¾
" 209½ ft. (lineal) of small jamb casings to window frames, made necessary on acct. of battening, and painting do., $4 72.....	9	42¾
" 10 ft. of plain casing to the opening in partition, made by the change ordered to back stairs, 10 c.....	10	00
" increased size of closets, by change of do.....	6	00
" 62 feet lineal of 4 x 6 N. C. posts, and lintel put under iron girder across entrance passage, to assist in supporting chimney, 12 c..	7	44
" 35⅓ ft. sup'l ⅝ open jambs, to cover rough posts, and painting, 28 c	9	89
" 32 ft. (lineal) bedded grounds to do., 9 c.....	2	88
" 64½ ft. (lineal) ⅝ opened pilaster to do., and painting, 20 c....	12	90
" 8 ft. of crown moulding to do., 12 c..... 96		
" 2 bare blocks, 35 c..... 70		
—	1	66
" 2 trap-doors, one over each reservoir, 2 dolls	4	00
432 ft. (sup'l) stud partition, taken down and set up again 21 on principal floor, by order Miss Dermott, 1½ c	6	48
To 46 ft. of mahogany hand rail, back stairs, more value than cherry, 8 c.....	3	68
To 1,440 ft. (sup.) of joists to front stairs, levelled up one foot above contract, by direction of Miss Dermott, and afterwards levelled and relevelled by her order, 1½ c.....	21	60

To joint holes, cut out one foot high for the above, and filling up do., furnishing mortar and brick, 37½ c	13	50
" 748 lbs. cast-iron girders, put across main passage to support chimney, including setting of do., 3½ c	26	18
" 645 lbs. of cast-iron girder, put across the alley, 3d story, 3¾ c	24	18¾
" 405 lbs. of cast-iron girder across circular passage, 4th story, 3⅞ c.	15	69
" 1,027 lbs. of cast-iron girder, put across alley, 7th street front, 3½c.	35	94½
" 105 lbs. of wrought-iron rods, with nuts, to strengthen vaults, 12½ c	13	12½
" 260 lbs. of cast-iron washers to heads of bolts, 3½ c	18	45
" 3,300 brick laid in raising the store floor one foot by direction of Miss Dermott, and by her direction taken off, 6 c	19	80
" use of long timbers, and working sewering front	30	00
" 455 ft. (sup.) 14 in. front wall and rebuilt, brick enveloped in cement, and faced in tucked joints, oiled, and penciled, 30 c	136	50
" 3,000 best quality front brick, furnished for do., 20 dolls	60	00
" 4 barrels of cement, and the necessary sand and labor, $2 50	10	00
" 37 feet (lineal) of marble heads, sills, replacing of those which broke by the settlement, including settling of do., $1 25	46	25
" 105 feet (sup'l) 9-in. wall, west, over alley, taken out twice and rebuilt because of settlement, 25 c	26	25
" 210 feet (lineal) of joisting, raised, by cutting out brick over do., and filling again with brick and mortar underneath, rendered necessary by reason of settlement, 25 c	52	50
" 14 yards of excavation, by extending alley vaults 5 feet, 25 c	3	50
" 780 brick laid in arch of vault, by extension of do., the brick all hard, and laid in cement and grated, 15 c	11	70
22 To 12 5/12 ft. (lineal) of water tables, more than contract, $1 25	15	52
To 6 extra bells in 5th story, hung in metallic tubes, $7 50	45	00
" 124 feet (lineal) of extra cast-iron soil pipe, 75 c	93	00
" four elbows	6	25
" 2 extra cast-iron curbs to vaults, made necessary by reason of the undue settlement	5	00
" 5 yards of stone paving in extension vaults, 50 c	2	50
" sundry repairs to plastering and lathing, occasioned by the insertion of gas pipes	25	00
" cutting through the walls of vault, and repairing of do., for the change of direction of the soil pipe	3	00
" altering of eave gutter to warehouse, rendered necessary in consequence of the settlement in that wall	3	00
" 7 15/25 perches of stone footings to south front wall and a part of the east wall; the old stone wall not being as deep as was supposed, 30 c	22	80
	1,136	23½

Instalment due on contract on delivery of store and warehouse, $5,000.

Rule plea to amended nar.

Whereupon, on motion of the said plaintiff, by his attorneys aforesaid, it is rule by the court here, that the said defendant answer to the amended declaration aforesaid of the said plaintiff in the plea aforesaid, or judgment by the court here will be entered against her in default thereof. Thereupon the said defendant, by her attorneys aforesaid, filed the following objections to the reception and allowance of the said amended declaration, to wit:

Objections to reception and filing of amended nar.

The defendant, by her counsel, takes the following objections to the reception of the within amended declaration, to wit:

1st. Because neither the said declaration nor any of the counts therein contained come within the terms and intent of the general leave and allowance of amendment granted by the court in this cause, and under color of which they have been filed by the plaintiff.

2d. Because if any of the counts contained in said declaration could be held to come within the terms and intents of the leave and allowance of
23 amendment actually granted in this cause as aforesaid, and within the established limits of the competency, power, and authority of this court to grant amendment of pleading; yet the said 3d and 4th counts are quite beyond the court's power, authority, and competency in such cases.

W. JONES & J. C. BRENT,
For Def't.

Oyer of articles of agreement referred to in the 1st and 2d counts of amended nar., prayed under protest.

And thereupon the said defendant, by her attorneys, further say, that having already filed objections to the reception of the amended declaration, and more especially of the 3d and 4th counts thereof, filed by plaintiff in this case, under color and pretence of the liberty granted by the court to amend his original declaration now, without waiving or in any manner relinquishing said objections, or any of them, but still reserving and insisting on the same, prays oyer of the articles of agreement mentioned and recited in the 1st and 2d counts of his pretended declaration.

And the said defendant, protesting that the said declaration has never been presented to the court for acceptance, or in any manner allowed or authorized by the court, the defendant disavows and protests against the authority of the clerk to enter such rule, or in any manner to enforce it or carry it into effect, either by defaulting defendant or by any pro forma issue made by himself.

September 24th, 1856.

Continuance to Oct. term, 1856.

Thereupon further process of and upon the premises aforesaid between the parties aforesaid, by consent of the said parties, and their attorneys aforesaid, and by order of the court here thereon, the said cause is further continued until the third Monday of October next.

At which mentioned third Monday of October, in the year eighteen hundred and fifty-six, to which day the said cause was continued, comes again into the circuit court here, as well the said plaintiff, by his attorneys aforesaid, as the said defendant, by her attorneys aforesaid.

Objections to filing amended nar. overruled.

And thereupon the court, after hearing arguments as well on the part of plaintiff as of defendant, upon the said objections filed by the defendant on the first day of July preceding, to the reception and allowance of the said amended declaration, overruled all the said objections, and allowed the said amended declaration to stand; to which defendant, by her attorneys, excepted.

Oyer of writ craved.—Oyer refused by the court.

And thereupon the said defendant, by her attorneys aforesaid, craves oyer of the original writ of capias ad respondendum in this suit, and prays
24 the court to order the clerk to give the defendant such oyer; which prayer the court refused to grant.

Motion to quash orig'l wr.

Whereupon the said defendant, by her attorneys aforesaid, preferred to the court the following motion:

1. That the original writ in this cause be quashed, for vices and defects appearing on its face, inasmuch as it names no certain sum of money as constituting the debt sued for.

2. That the amended declaration be set aside for vices and defects apparent on its face, in this, to wit:

1st. That the commencement of the declaration is untrue in fact, and varies from the writ, inasmuch as defendant was not summoned to answer plaintiff in such sum as is set forth in said commencement.

2dly. That the aggregate amounts of the debts declared for in the said declaration amount to more than the sum of money named in the commencement, &c.

3dly. That as to the 3d and fourth counts of said declaration, divers and distinct causes of action are joined, instead of declaring for each of the same in a separate count.

4thly. That by the proceedings and record in this case the plaintiff is estopped from introducing the causes of action introduced into the said counts.

W. JONES.
J. C. BRENT,
For Def't.

Objections to amended nar. overruled.

In this cause the defendant having filed objections to the filing of the amended nar., by which amendments profert was made of certain articles of agreement, and, pending such objections, having craved oyer of the said articles of agreement, to wit, on the 24th Sept., 1856, not waiving but reserving his said objections, it is now by the court ordered, this 17th January, 1857, that the said objections be overruled, and that the plaintiff have leave to withdraw the Exhibit No. 1, in his bill against the said defendant, pending on the equity side of this court, on leaving a copy certified by the clerk among the files of the said equity cause.

Oyer granted.

And that thereupon the over craved be entered of record in this cause as granted and had; and that the day to plead be enlarged to the first Monday of February next.

By order of the court.
Test: JNO. A. SMITH, *Cl'k.*

25 *Rule plea to 1st Monday in Feb'y, 1857.—Pleas to amended nar.*

At which mentioned first Monday in February, 1857, the said Ann R. Dermott, the defendant, by her attorneys aforesaid, comes and defends the wrong and injury, when, &c., and craves oyer of the said articles of agreement in the

said first and second counts of the plaintiff's said amended declaration mentioned and made profert of, (the same identical deed and articles of agreement being so mentioned and made profert of in each of said counts,) and it is read to her in these words: "These articles of agreement," &c., (copied in page 132:) which being read and heard, the said defendant says she does not owe the said sum of money above demanded in the said first count of the said declaration, or any part thereof, in manner and form as the said plaintiff has above thereof complained against her; and of this the said defendant puts herself upon the country, &c.; and the plaintiff doth so likewise.

Issue joined to 1st plea.

2. And for further plea in this behalf as to the said first count of the said declaration, the said defendant, by leave of the court here, for that purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff did not fulfil and perform the said agreement in all things on his part, according to the tenor and effect of the said articles of agreement, in manner and form as the said plaintiff in the said count has averred; and of this she in like manner puts herself upon the country, and the plaintiff doth so likewise.

Issue joined to 2d plea.

3. [Here insert the foregoing plea down to the conclusion, to the country; and omitting that, proceed as follows:] but failed and neglected so to fulfil and perform the same, and especially in this, that he did not fulfil and perform the precedent condition, upon the performance of which on his part the defendant in and by the said articles of agreement covenanted to pay the said instalment of $5,000 above demanded by plaintiff in the said first count; that is to say, that the three stores fronting on Market space, and the warehouse on 7th street, in the said articles of agreement, and in the said condition mentioned, were not executed, finished, and ready for use and occupation, and delivered over so finished and ready, to said defendant, on or before the first day of October then next ensuing the date of said articles, according to the tenor and effect of said articles of agreement; and of this the defendant in like manner puts herself upon the country.

4. And as to the residue of the said declaration, the said defendant, by leave of the court here for that purpose first had and obtained, according to
26 the form of the statute in such case made and provided, says that the said second, third, and fourth counts of the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and she the said defendant is not bound by law to answer the same, or any of them; and this she is ready to verify. Wherefore, by reason of the insufficiency of the said three counts of the said declaration in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against her, &c.

And the said defendant, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the said three counts of the said declaration, severally and respectively, that is to say:

Demurrer to 2d count of amended nar.

As to the said second count, for that it is argumentative, vague, and uncertain, in this, that instead of alleging and setting forth the fact or facts and circumstances of his performance of the covenants and conditions, covenanted and

conditioned on his part to be done and performed in and by the said articles of agreement, and especially of his having performed the condition precedent, upon the performance whereof on his part the payment on the part of the defendant of the said instalment of $5,000, on the first day of October then next ensuing, depended, it is circuitously and argumentatively alleged in said count that he did on his part faithfully perform all things in the said agreement stipulated to be done and performed, according to the true intent and meaning of the said agreement; and for that the said count attempts to put in issue, to be tried by the country, mere inference and matter of law, viz: whether the acts, matters, or things to be adduced on his part by way of evidence to support his said allegation of performance, were, according to the true intent and meaning of the said articles of agreement, a due and sufficient performance of the covenants and conditions stipulated to be done and performed on his part in and by the said articles of agreement, and especially of the said condition precedent.

And further, that the said count is repugnant, and contains material allegations inconsistent with each other, in this, to wit: that although in the first part of said count a full and complete performance by the plaintiff of all the covenants and conditions whatsoever covenanted and conditioned on his part to be fulfilled and performed in and by the said articles of agreement, is in substance and effect alleged and averred, nevertheless, in the subsequent part of the said count the plaintiff sets up and alleges an excuse for his having
27 failed to fulfil and perform one of the most material of his covenants, namely, the covenant that the three stores described in the said articles of agreement as fronting on Market space, and the warehouse on 7th street, should be executed, finished, and ready for use and occupation, and be delivered over so finished and ready to said defendant, on or before the first day of October thence next ensuing; the due performance of which covenant on or before the said day was in and by the said articles of agreement made a condition precedent to said defendant's said covenant to pay to the plaintiff the said instalment of $5,000, as aforesaid.

And for that the plaintiff, in making out his said excuse, has alleged certain actings and doings of the defendant in the premises, as having hindered and prevented him from performing and fulfilling the said condition precedent, all which actings and doings were manifestly idle, insufficient and inoperative to produce or in any manner interpose any such hindrance, prevention, or even delay, but left the defendant perfectly free, and nevertheless bound to proceed with the execution of his said contract and the fulfilment of the said condition precedent, had he been so minded.

And for that the said count is double and multifarious in this, to wit: that in substance and effect it sets up and alleges:

First. A complete fulfilment and performance, by himself, of the said contract in all things on his part and behalf to be fulfilled and performed.

Secondly. An excuse for not having performed and fulfilled the said condition precedent.

Thirdly. That he did perform and fulfil it within a due and reasonable time after the said first day of October.

And fourthly. That the said stores and warehouse were occupied and received by said defendant, and used, occupied and enjoyed by her, within a due and reasonable time after the said first day of October.

And further, that the said instalment is not suable and recoverable in an action of debt; but if suable and recoverable in any form of action, it should have been an action of covenant.

Dem'r to 3d and 4th counts of amended nar.

And, as to the said third and fourth counts, for that they are, both and each of them, double and multifarious, for that in the third count, four several and distinct debts and causes of action, each debt being in the sum of $5,000, and in the fourth count two several and distinct debts and causes of action, each debt being in the sum of $10,000, are alleged and demanded.

For that the said six several and distinct allegations of debt, the four in the third count, and the two in the fourth count, are not brought forward, and cannot be received and treated as so many several and distinct counts of
28 the said declarations, being consolidated with and made part and parcel (the first four) of the said third count eo nomine, and the other two of the said 4th count eo nomine; and inasmuch as all the said allegations of debt, subsequent to the first in each of the said counts, are without the commencements and conclusions proper to separate counts of a declaration, and made indispensable by the law and practice of pleading.

And for that the aggregate sum of the debts alleged and demanded in the said two counts, and in each and every of them, greatly exceeds the limit of the aggregate sum of debt sued for and recoverable in this action.

For that the said allegations of debts in the said fourth count are not laid with an alias, or in any other way to distinguish them, or the considerations of the same, or the contract by which they were created from the corresponding allegations of debts in the said 3d count, to wit: from the allegation of the debt of $5,000 for work, labor, &c., in building the three stores and warehouse in the said 3d count mentioned, or from the allegation in the said third count of the debt for five thousand dollars, for money paid, laid out and expended by plaintiff to the use of defendant; on the contrary, the said allegations of debt in the 4th count purport to be the same as the two allegations of debt in the third count, or else to include the same; and so, in either way the plaintiff in the said 4th count has demanded a double satisfaction for the same thing.

And also that the said three counts of the said declaration are in other respects uncertain, informal, and insufficient, &c.

W. JONES & J. C. BRENT,
For Def't.

Dem'r to 3d plea to 1st count amended nar.

And the said plaintiff by his attorneys aforesaid, as to the said third plea of the said defendant by her thereby above pleaded to the said first count, saith that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof, against the said defendant; and he, the said plaintiff, is not bound by law to answer the same. And this the said plaintiff is ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment, and his debt aforesaid, together with the damages by him sustained on occasion of the detention thereof, to be adjudged to him, &c., &c.

And the said plaintiff, according to the form of the statute, &c., states and shows to the court here the following causes of demurrer to the said plea, that is to say:

1. That it is set up and alleged in the said plea, as the true intent and meaning and legal effect of the before mentioned articles of agreement, that
29 the said stores and warehouse should be executed, finished, and ready for use and occupation, and delivered over so finished and ready to the

said defendant, on or before the first day of October next ensuing the date of the said articles, as a condition precedent to any duty upon the defendant to pay the said sum of $5,000.

2. That the said plea attempts to put in issue to be tried by the country mere inference and matter of law, viz: whether it be the true construction of the said articles of agreement, that the said sum of $5,000 was only to be paid on the express and absolute condition that the said stores and warehouse should be executed, finished, and ready for use and occupation, and delivered over so finished and ready to the defendant, on or before the said 1st day of October.

Joinder to def't's dem'r to 2d, 3d, and 4th counts of amended nar.

And the said plaintiff says that the said 2d, 3d, and 4th of the declaration aforesaid, and the matters therein contained, are sufficient in law for the said plaintiff to maintain his action thereof against the said defendant, which said counts, and the matters therein contained, the said plaintiff is ready to verify and prove, as the court shall award; and because the defendant hath not answered the said three counts, nor in anywise denied the same, the said plaintiff prays judgment and his debt aforesaid, together with his damages, by reason of the detention of that debt to be adjudged to him, &c.

Joinder to pl'ff's dem'r to 3d plea to 1st count of amend. nar.

And the said defendant saith that her 3d plea aforesaid, in manner and form aforesaid, by her, the said defendant, above pleaded to the first count of the amended nar., and the matters in the same contained, are good and sufficient in law to quash the said writ of the said plaintiff, which said plea so pleaded, and the matters therein contained, she, the said defendant, is ready to verify and prove, as the said court shall award; and because the said plaintiff hath not answered the said plea, nor hitherto in any manner denied the same, she, the said defendant, as before, prays judgment, &c.

Venire facias to March term, 1857.

Therefore, as well to try the issues aforesaid above joined between the parties aforesaid, to be tried by the country, as to inquire what damages the said plaintiff hath sustained by reason of the premises whereof the said parties have put themselves upon the judgment of the court, if judgment shall thereupon happen to be given for the said plaintiff against the said defendant, let a jury thereon appear before the court here, on the fourth Monday of March next, by whom, &c., and who neither, &c., to recognise, &c., because as well, &c. The same day is given to the said parties then and there, and so forth.

30 *Motion by pl'ff for judg't on his dem'r to 3d plea, and for interlocutory judg't on def't's demurrers.*

At which said fourth Monday of March, in the year of our Lord one thousand eight hundred and fifty-seven, comes again into the circuit court here, as well the said plaintiff, by his attorneys aforesaid, as the said defendant, by her attorneys aforesaid; whereupon the said plaintiff, by his attorneys aforesaid, moves the court to cause and order judgment to be entered for him in this cause, as follows:

Upon his demurrer to the third plea, pleaded as aforesaid, judgment for the plaintiff for costs.

And also upon the several and respective demurrers filed by the said defendant; judgment for the plaintiff; each of said last mentioned judgments to be interlocutory only, and to be followed by a special venire for an inquisition to assess the damages sustained by the said plaintiff by reason of the several mat-

ters set out in said declaration, and to which said demurrers respectively relate. Judgment accordingly.

Continuance to Oct'r term, 1857.

Thereupon further process of and upon the premises aforesaid between the parties aforesaid, by consent of the said parties, by their attorneys aforesaid, and by order of the court here, the said cause is continued until the third Monday of October next.

And now at this day, to wit, the said third Monday of October, in the year eighteen hundred and fifty-seven, comes again into the circuit court here, as well the said plaintiff, by his attorneys aforesaid, as the said defendant, by her attorneys aforesaid; whereupon, for trying the issues aforesaid, it is ruled by the court here that twelve persons from the panel of petit jurors returned to the court here by the marshal of the District of Columbia be called.

Whereupon the defendant now here moves the court, before the jury is empanelled, to require the plaintiff to elect between a recovery on the bills of particulars filed in this cause under the third and fourth counts of the amended nar, and a recovery on the same causes of action under the bill in equity filed on the equity side of this court by the above plaintiff against this defendant.

R. J. BRENT,
J. C. BRENT,
For Def't.

The plaintiff having heretofore, under the order of this court, elected to prosecute in equity his claim for $14,000, mentioned in the contract, which election is still operative, the court refuses so much of the defendant's motion as applies to that sum, and grants the same so far as relates to the alleged extra work, it being the extra work described in Exhibit No. 3, filed with the proceedings in equity, to wit, $1,136\frac{23}{100}$.

By order of the court.

31 And thereupon the plaintiff elects to prosecute his said demand on account of extra work in this present suit at law, being the same extra work described in the Exhibit No. 3, with the proceedings in equity, viz., $1,136\frac{23}{100}$.

BRADLEY, CARLISLE & MAURY,
For Pl'ff.

Octo. 26th, 1857.

The plaintiff having elected to prosecute his claim for extra work in this suit, the defendant objects and insists that the plaintiff ought not to be allowed to introduce by his amended nar, or otherwise, a new and distinct cause of action which the plaintiff did not originally declare on, or sue for, as shown in his election heretofore filed, as well as by his original nar; and thereupon the defendant moves the court to order said fourth count of the amended nar to be taken off the files, and stricken out of the proceedings in this cause; but the court refused to grant said motion; and thereupon the defendant excepts, and this, her bill of exceptions, is signed, sealed and enrolled, on this 26th Octo., 1857, before the empanelling of the jury.

JAS. DUNLOP. [SEAL.]
JAS. S. MORSELL. [SEAL.]
WM. M. MERRICK. [SEAL.]

Verdict on 1st count.—Damages $5,000.—Jury.

Thereupon the jury being called, came, to wit:

1. James A. Kennedy; 2. John Shaw; 3. Thomas Riggles; 4. George D. Spencer; 5. Wm. Drury; 6. Thos. Fitnam; 7. Dan'l F. Barry; 8. Alex'r

Jackson; 9. Geo. B. Smith; 10. Mich'l R. Coombs; 11. Edgar H. Bates; 12. W. A. Kennedy; who being duly empanelled, and sworn to say the truth, and assess the damages of and upon the premises aforesaid, upon their oath do say, that the said defendant is indebted to the said plaintiff in the sum of five thousand dollars, lawful money, with interest from the first of December, 1851, according to the terms, true intent and meaning of the agreement set forth in the first count of the amended declaration.

And on the 4th count of amended declaration for extra work, return to the court the following inquisition, to wit:

Inquisition on 4th count for extra work.—Damages $1,136 23½.

This inquisition, made, indented and taken at the bar in the circuit court of the District of Columbia, at the October term, 1857, of the said court, in an action of debt there depending between Zepheniah Jones, plaintiff, and Ann R. Dermott, defendant, witnesseth, that we, the jurors, whose names are subscribed, and seals affixed hereto, being duly empanelled, sworn and charged to inquire of the damages sustained by the said plaintiff in the said action by reason of the several causes of action in the fourth count of the declaration of the
32 said plaintiff mentioned, having heard the evidence given in said action, and duly considered the same, do find and assess the damages sustained by the said plaintiff in the said action to be the sum of eleven hundred and thirty-six dollars and twenty-three and a half cents, with interest from April 5th, 1852, and the costs of the said suit.

In witness whereof, we, the said jurors, have hereto set our hands and seals this thirteenth day of November, 1857.

J. A. KENNEDY.	[SEAL.]
EDGAR H. BATES.	[SEAL.]
DAN'L BARRY.	[SEAL.]
WM. P. DRURY.	[SEAL.]
GEO. B. SMITH.	[SEAL.]
MICHAEL R. COOMBS.	[SEAL.]
ALEXANDER JACKSON.	[SEAL.]
THOS. RIGGLES.	[SEAL.]
JOHN SHAW.	[SEAL.]
G. D. SPENCER.	[SEAL.]
THOS. FITNAM.	[SEAL.]
W. A. KENNEDY.	[SEAL.]

Inquisition to 3d count.—Damages 1 *cent.*

And inquisition as to 3d count, as follows, to wit:

This inquisition, made, indented and taken at the bar in the circuit court of the District of Columbia, at the October term, 1857, of the said court, in an action of debt there pending between Zepheniah Jones, plaintiff, and Ann R. Dermott, defendant, witnesseth, that we, the jurors, whose names are subscribed, and seals affixed hereto, being duly empanelled, sworn and charged to inquire of the damages sustained by the said plaintiff in the said action by reason of the several causes of action in the third count of the declaration of the said plaintiff mentioned, having heard the evidence given in said action, and duly considered the same, do find and assess the damages sustained by the said plaintiff in the said action to the sum of one cent, and the costs of the said suit.

In witness whereof, we, the said jurors, have hereto set our hands and seals this 13th day of Nov., 1857.

J. A. KENNEDY.	[SEAL.]
MICHAEL R. COOMBS.	[SEAL.]
EDGAR H. BATES.	[SEAL.]
DANIEL BARRY.	[SEAL.]
WM. P. DRURY.	[SEAL.]
G. B. SMITH.	[SEAL.]
ALEXANDER JACKSON.	[SEAL.]
JOHN SHAW.	[SEAL.]
THOS. FITNAM.	[SEAL.]
THOS. RIGGLES.	[SEAL.]
G. D. SPENCER.	[SEAL.]
W. A. KENNEDY.	[SEAL.]

33 *Inquisition as to 2d count.—Damages 1 cent.*

And inquisition as to second count, as follows, to wit:

This inquisition, made, indented, and taken at the bar in the circuit court of the District of Columbia, at the October term, 1857, of the said court, in an action of debt therein depending between Zepheniah Jones, plaintiff, and Ann R. Dermott, defendant, witnesseth, that we, the jurors, whose names are subscribed, and seals affixed hereto, being duly empanelled, sworn, and charged to inquire of the damages sustained by the said plaintiff in the said action by reason of the several causes of action in the second count of the declaration of the said plaintiff mentioned, having heard the evidence given in the said action, and duly considered the same, do find and assess the damages sustained by the said plaintiff in the said action to the sum of one cent, and the costs of the said suit.

In witness whereof, we, the said jurors, have hereunto set our hands and seals this 13th day of Nov., 1857.

J. A. KENNEDY.	[SEAL.]
MICHAGL R. COOMBS.	[SEAL.]
EDGAR H. BATES.	[SEAL.]
GEO. B. SMITH.	[SEAL.]
WM. P. DRURY.	[SEAL.]
ALEXANDER JACKSON.	[SEAL.]
DANIEL BARRY.	[SEAL.]
JOHN SHAW.	[SEAL.]
THOS. RIGGLES.	[SEAL.]
THOS. FITNAM.	[SEAL.]
G. D. SPENCER.	[SEAL.]
W. A. KENNEDY.	[SEAL.]

Judg't.

Therefore it is considered by the court here that the said plaintiff recover against the said defendant as well the sum of five thousand dollars, lawful money, with interest from 1st Dec'r, 1858, his damages aforesaid by the jurors aforesaid in form aforesaid assessed by reason of the premises set forth in the *the* first count of his declaration, as also the several sums of money, his damages aforesaid by the inquisitions aforesaid in form aforesaid found, and also the sum of two hundred and one dollars and sixty cents by the court now here adjudged unto the said plaintiff for his costs and charges by him about his suit in this behalf expended, and the said defendant in mercy, &c.

Test: JNO. A. SMITH, *Cl'k.*

Memorandum.

Before the jurors aforesaid retired from the bar of the court here, the said defendant, by her solicitor aforesaid, filed in court here the following bill of exceptions:

34 *Def't's 1st exception.*

JONES *vs.* DERMOTT. } Defendant's 1st exception—Plaintiff's statement of evidence.

On the trial of this cause, the plaintiff, to maintain the issues on his part joined upon the first count; and for the taking of the inquisitions upon the other counts in the declaration, offered and gave in evidence, without objection, the certain contract mentioned in the declaration, with the specifications annexed thereto, and forming part thereof, and proved that the same were duly signed and sealed by the pl'ff and def't, as they purport to be, which are as follows, (copied on page .)

And further gave evidence, that the plaintiff did diligently and faithfully proceed in the execution of the work specified therein, and did in fact finish and make ready for use and occupation, and did so deliver over to the defendant the three stores and warehouse mentioned in the contract, on or about the 4th day of December, 1851; and that the said stores and warehouse would have been completed by the 1st day of October, 1851, but for certain changes and alterations and departures from the contract and specifications aforesaid, made and required by the said defendant, and involving additional work and considerable delays from time to time; and also gave evidence that a further cause of delay occurred by reason of the sinking of the earth foundations under a portion of the walls of the said building; and, respecting the said earth foundations, gave evidence that the same were dug out in accordance with the requirements of the said specifications, and under the inspection and direction of an architect and superintendent employed by the defendant for the purpose of seeing that the said contract was faithfully executed; and that the same were excavated as low as the mouth of the sewer mentioned in the specifications would admit; and that the trenches for the stone footings of the walls were dug out three inches below the excavation of the cellar; and that the said excavation, when so made, revealed apparently sound and perfect earth foundations of yellow clay; that the same were carefully examined by the said architect and superintendent, and were approved by him, and were also examined by the plaintiff, and by other persons, and were tested with a crowbar by the carpenter and builder who was superintending and contracting the work for the plaintiff, and that there was not the slightest indication of any defect in the same; that afterwards, and while the building was progressing, the defendant required a stack of hanging chimneys, not embraced in the contract, of great weight, to be suspended upon one of the walls, and also required the walls to be higher than specified in the contract; and that defendant was cautioned by her said architect, as well as by the plaintiff, against increasing
35 the weight of the said walls, lest the same might occasion the earth foundations to give way or settle, but she replied that she would take the responsibility, and accordingly her requirements were carried into execution; that thereafter the said wall sank between four and five inches at its extremity, carrying with it certain dependent walls; that the plaintiff reconstructed and repaired the said wall, and that the cost thereof is charged in the bill of extra work referred to in the declaration, of $; that thereafter the said wall sunk and settled again at the same point, so that its greatest depres-

sion was about 8¼ or 8½ inches; and further gave evidence that the said walls were built and constructed in a good, faithful, and workmanlike manner, and that the sinking thereof was not in any degree attributable to defect of work or materials, but was solely owing to a latent defect in the earth foundation not discernible or in any degree indicated when the foundation was laid; that the walls stood firm except at and adjoining the spot where the aforementioned greatest depression took place; and further gave evidence tending to show that it appeared by subsequent developments that below the yellow clay foundation above mentioned there was a deposit of blue marsh mud—the crust of yellow clay being some feet thick at a central point and diminishing in thickness in a wedge-shape until it was only about 6 inches thick at a point where the wall sunk 8½ inches as aforesaid; that the said wall sunk or settled gradually in a right line from its western extremity, where it stood firm, to its eastern terminus, where its said greatest depression was, and that it had reached its greatest settlement in the month of December, 1851, and found its bearing.

And further gave evidence to show that the said stores and warehouse were completed and delivered over, finished and ready for use and occupation, within a reasonable time after the said 1st day of October.

And further gave evidence tending to show that the extra work mentioned in the bill of particulars was done by the pl'ff at the special instance and request of the defendant, and that the same was reasonably worth the prices and sum charged therefor.

And it further appeared on cross-examination of the plaintiff's witness, by whom the above facts were given in evidence, that after the first settlement of the walls the plaintiff undertook to reconstruct the said walls, upon a promise by said witness (who was the architect and superintendent of the def't) that the defendant would no doubt compensate him for the cost of such reconstruction; but the said witness also testified that he had no authority from said defendant for making such promise, other than the general authority originally reposed in him by the defendant to superintend and see that the contract and specifications were faithfully carried out by the plaintiff; and the same
36 witness also testified, that after such reconstruction, and before the plaintiff had delivered over said stores and warehouse, and while the same was in charge of the plaintiff, a second settlement of said walls and the foundation thereof took place as hereinbefore related, which the plaintiff did not undertake to repair or reconstruct, but left the building with the walls sunken in fact to the depth of 8½ or 8¼ inches; and the plaintiff thereupon rested.

The defendant then, to maintain the issues on her part and to reduce the damages claimed by the plaintiff, read in evidence to the jury two letters written by the plaintiff to the defendant, dated 4th Dec., 1851, and 5th April, 1852, made a part hereof, (copied on page); and further gave evidence by various witnesses, who testified that in May, 1852, and shortly after the plaintiff had left the premises, the building erected by him, and for which he claims compensation in this suit, was found in a dilapidated, ruinous, and falling condition, unsafe and unfit for use and occupation; that such condition was the effect or consequence of the settlement or sinking of a portion of the store foundations, on which the brick walls of said warehouse and stores rested; that the earthen foundations on which said store and brick walls rested were found to be in a miry and infirm condition from the floods of water which was lying in considerable quantities in and about the earthen foundations of said buildings, and the walls had (in the opinion of experienced and competent architects and builders who examined the same) settled and sunk in the earth, because of its being softened by the flowing in of large quantities of water; that said water was found under the kitchen floor, and in various other portions of the basement floors, and appeared to be most accumulated at the points where the

Memorandum.

Before the jurors aforesaid retired from the bar of the court here, the said defendant, by her solicitor aforesaid, filed in court here the following bill of exceptions:

34 *Def't's 1st exception.*

JONES *vs.* DERMOTT. } Defendant's 1st exception—Plaintiff's statement of evidence.

On the trial of this cause, the plaintiff, to maintain the issues on his part joined upon the first count; and for the taking of the inquisitions upon the other counts in the declaration, offered and gave in evidence, without objection, the certain contract mentioned in the declaration, with the specifications annexed thereto, and forming part thereof, and proved that the same were duly signed and sealed by the pl'ff and def't, as they purport to be, which are as follows, (copied on page .)

And further gave evidence, that the plaintiff did diligently and faithfully proceed in the execution of the work specified therein, and did in fact finish and make ready for use and occupation, and did so deliver over to the defendant the three stores and warehouse mentioned in the contract, on or about the 4th day of December, 1851; and that the said stores and warehouse would have been completed by the 1st day of October, 1851, but for certain changes and alterations and departures from the contract and specifications aforesaid, made and required by the said defendant, and involving additional work and considerable delays from time to time; and also gave evidence that a further cause of delay occurred by reason of the sinking of the earth foundations under a portion of the walls of the said building; and, respecting the said earth foundations, gave evidence that the same were dug out in accordance with the requirements of the said specifications, and under the inspection and direction of an architect and superintendent employed by the defendant for the purpose of seeing that the said contract was faithfully executed; and that the same were excavated as low as the mouth of the sewer mentioned in the specifications would admit; and that the trenches for the stone footings of the walls were dug out three inches below the excavation of the cellar; and that the said excavation, when so made, revealed apparently sound and perfect earth foundations of yellow clay; that the same were carefully examined by the said architect and superintendent, and were approved by him, and were also examined by the plaintiff, and by other persons, and were tested with a crowbar by the carpenter and builder who was superintending and contracting the work for the plaintiff, and that there was not the slightest indication of any defect in the same; that afterwards, and while the building was progressing, the defendant required a stack of hanging chimneys, not embraced in the contract, of great weight, to be suspended upon one of the walls, and also required the walls to be higher than specified in the contract; and that defendant was cautioned by her said architect, as well as by the plaintiff, against increasing
35 the weight of the said walls, lest the same might occasion the earth foundations to give way or settle, but she replied that she would take the responsibility, and accordingly her requirements were carried into execution; that thereafter the said wall sank between four and five inches at its extremity, carrying with it certain dependent walls; that the plaintiff reconstructed and repaired the said wall, and that the cost thereof is charged in the bill of extra work referred to in the declaration, of $; that thereafter the said wall sunk and settled again at the same point, so that its greatest depres-

sion was about 8¼ or 8½ inches; and further gave evidence that the said walls were built and constructed in a good, faithful, and workmanlike manner, and that the sinking thereof was not in any degree attributable to defect of work or materials, but was solely owing to a latent defect in the earth foundation not discernible or in any degree indicated when the foundation was laid; that the walls stood firm except at and adjoining the spot where the aforementioned greatest depression took place; and further gave evidence tending to show that it appeared by subsequent developments that below the yellow clay foundation above mentioned there was a deposit of blue marsh mud—the crust of yellow clay being some feet thick at a central point and diminishing in thickness in a wedge-shape until it was only about 6 inches thick at a point where the wall sunk 8½ inches as aforesaid; that the said wall sunk or settled gradually in a right line from its western extremity, where it stood firm, to its eastern terminus, where its said greatest depression was, and that it had reached its greatest settlement in the month of December, 1851, and found its bearing.

And further gave evidence to show that the said stores and warehouse were completed and delivered over, finished and ready for use and occupation, within a reasonable time after the said 1st day of October.

And further gave evidence tending to show that the extra work mentioned in the bill of particulars was done by the pl'ff at the special instance and request of the defendant, and that the same was reasonably worth the prices and sum charged therefor.

And it further appeared on cross-examination of the plaintiff's witness, by whom the above facts were given in evidence, that after the first settlement of the walls the plaintiff undertook to reconstruct the said walls, upon a promise by said witness (who was the architect and superintendent of the def't) that the defendant would no doubt compensate him for the cost of such reconstruction; but the said witness also testified that he had no authority from said defendant for making such promise, other than the general authority originally reposed in him by the defendant to superintend and see that the contract and specifications were faithfully carried out by the plaintiff; and the same
36 witness also testified, that after such reconstruction, and before the plaintiff had delivered over said stores and warehouse, and while the same was in charge of the plaintiff, a second settlement of said walls and the foundation thereof took place as hereinbefore related, which the plaintiff did not undertake to repair or reconstruct, but left the building with the walls sunken in fact to the depth of 8½ or 8¼ inches; and the plaintiff thereupon rested.

The defendant then, to maintain the issues on her part and to reduce the damages claimed by the plaintiff, read in evidence to the jury two letters written by the plaintiff to the defendant, dated 4th Dec., 1851, and 5th April, 1852, made a part hereof, (copied on page); and further gave evidence by various witnesses, who testified that in May, 1852, and shortly after the plaintiff had left the premises, the building erected by him, and for which he claims compensation in this suit, was found in a dilapidated, ruinous, and falling condition, unsafe and unfit for use and occupation; that such condition was the effect or consequence of the settlement or sinking of a portion of the store foundations, on which the brick walls of said warehouse and stores rested; that the earthen foundations on which said store and brick walls rested were found to be in a miry and infirm condition from the floods of water which was lying in considerable quantities in and about the earthen foundations of said buildings, and the walls had (in the opinion of experienced and competent architects and builders who examined the same) settled and sunk in the earth, because of its being softened by the flowing in of large quantities of water; that said water was found under the kitchen floor, and in various other portions of the basement floors, and appeared to be most accumulated at the points where the

walls had sunken the most. And the defendant further proved, by various witnesses, that there was no sufficient or adequate drainage of the floors and foundations of said three stores and warehouse, as constructed by the plaintiff, but that water during a heavy rain was seen running into the foundations of said building in large quantities, especially from a down-spout, which emptied in the gutter over the arch as constructed by the defendant; that said down-spout had neither an elbow nor dish-stone to slant or receive the water descending through the spout, but there was a flag-stone under the spout, which, in the opinion of experienced and competent architects and builders, was improper and unsafe, inasmuch as the water descending through the spout ought to have been carried off horizontally by an elbow at the base of the spout, emptying into a dish-stone, and not a flag-stone, and that water falling on a flag-stone will run off all around it and settle under the bed of the stone, so as ultimately to form a hole under the stone, which will continue to deepen under the action of the water; that in fact the water from said down-spout had broken or
37 worn through the crown of the arch, which had settled at that point, admitting into the basement floor a large current of water when it rained. The def't also gave evidence, by various witnesses, to show that the building as constructed by the plaintiff was otherwise defective in respect to drainage of water flowing into or about its foundations from other sources, because the earthen floors were lower than the area pavement around said building, and that pavement was also lower than the mouth of the sewer opening into the area wall, into which sewer all the water flowing from the roof of said building, or otherwise coming on the earthen floors of said building, was intended to and could only flow for an outlet, and that said water could only reach said outlet by overflowing in the basement of said building, and on the area pavement, to a height sufficient to run off through the opening into the sewer, the mouth of which was from 3 to 5 inches above the said area pavement, as found by the witnesses of the defendant, after the plaintiff had abandoned said building; that the defective, insufficient, and unskilful drainage of the basement of said stores and warehouse, and the accumulation of water as found in and about the foundations of the walls, was in itself a sufficient cause for the sinking and settlement of the walls, however perfect and sufficient the substratum of earth may have been.

The def't further gave evidence, by several witnesses, to show that the work done by said pl'ff in and about said warehouse and stores was unskilfully and improperly done, both in respect to the inferior character of materials and the unworkmanlike manner in which the same was constructed, and especially in the construction of the store wall, carrying iron columns as described and required in the within specifications, and which store wall was put up by the plaintiff in an unskilful and unworkmanlike manner, with inferior stone, and by setting the stone on their edges and not laying them flat on their beds, as it was proper to do in a wall of that description, especially when intended to support iron columns, and also that the iron columns were improperly and unskilfully set on said wall, without sufficient iron plates and capstones of suitable thickness being provided at the base of said columns, and in consequence of said defects in the construction of said last wall and the placing of the columns thereon, the said wall split and bulged out and said iron plates and capstones cracked and broke.

The defendant also gave in evidence that the plaintiff had deviated from the specifications aforesaid in not constructing a portion of the area walls of the required thickness, and the same had to be reconstructed by the defendant in order to the erection of the front steps at the point named in said specifications, and also in not extending the same and bringing it to a point directly under the front steps as provided in said specifications; but instead of so doing, the plaintiff directed the drainage of water coming into the foundation of said building

to the mouth of the sewer, as used and connecting with an old building
38 standing on the same site prior to the execution of said contract, and which building the plaintiff took down and removed, as required in said contract.

And the defendant also gave in evidence that the reason why plaintiff did not so extend the sewer was because it came obliquely to the area wall, and the plaintiff alleged that if he extended it to that point it would deprive the area wall of their required thickness; but the defendant gave in evidence that *if* the plaintiff could have so extended the said sewer from a point sufficiently far back in its oblique direction to have enabled him to construct the area walls of the required thickness.

The defendant also gave in evidence to show that in consequence and by reason of the insufficient drainage and defective and unskilful workmanship of the plaintiff, the walls and stone foundations at various points sunk and settled in the substratum of earth on which this was built, to an extent in part thereof of at least 13 inches; such settlement caused great and serious injuries to the whole superstructure, by reason of the numerous and large fissures in the brick walls on 7th street bulged or inclined outwards, and was in imminent danger of falling into the street; that the roof of the building from such bulging and settlement was also in a dangerous condition, and the same had been forced to the edge of a slip, on which it hung by only an eighth of an inch.

The defendant gave in evidence that the said stores and warehouse were left by the plaintiff in the dangerous and untenantable condition above described, and that the plaintiff, after the said first settlement of the walls, and also after the second settlement, declared that he would make it all right before he gave up the building to defendant; and further proved that $422 of the extra work claimed by the plaintiff in the bill of particulars filed under his fourth count is charged for and on account of the plaintiff's attempted reconstruction of said walls after their first settlement as aforesaid. And thereupon the defendant, for the purpose of recovering, against the plaintiff's said claim, the damage which she had sustained by reason of the non-performance of the contract aforesaid on the part of the plaintiff, offered to give in evidence, by a competent witness, that the plaintiff wholly omitted to erect and furnish the front steps to the residue or boarding-house part of said building as specified in the said within specifications; and the defendant did erect and furnish the said steps at a large cost to her; and she also proposed to prove by the same witness the amount of such cost to her, but the court refused to allow the defendant to give said evidence as so offered by her, or any part of it; and thereupon the defendant excepts, and this, her bill of exceptions, is signed, sealed, and enrolled this 5th of November, 1857.

JAS. DUNLOP. [SEAL.]
JAS. S. MORSELL. [SEAL.]
WM. M. MERRICK. [SEAL.]

39 *Def"t's 2d exception.*

2d exception.

On the trial of this cause, in addition the evidence contained in the aforegoing exceptions made in part hereof, the defendant having given evidence, by R. Snowden Andrews, to prove that a well was dug on the premises in suit for the purpose, if possible, of draining the water found or which might accumulate in the foundations of said buildings, or the spring of 1852; and the said Andrews having given evidence to show that the said well was dug to a depth of 15 or 18 feet, when a strong stream of water was struck which rose to its surface and overflowed through a drain made to the sewer connected with said

premises, one of the judges of the court then inquired of said witness what the elevation of the bottom of said well from the level of the river; thereupon the said witness stated that the mouth of said well was only two or three feet above the level of said river, and the earth through which it was dug had the appearance of made or alluvial deposit, and the water so struck at the lowest depth may have been percolations from the river. The defendant's counsel, with a view to rebut said evidence so elicited by the inquiry of the court, and to show that a much larger building was erected and still stands in the vicinity of the premises upon ground of the same description as that found on the premises in dispute, and that said ground on which said building was erected is as low as that in dispute and nearer to the river, proposed to ask said witness what was the distance of Brown's Hotel, in the city of Washington, from the said river and from the premises in dispute, and what was the comparative elevation of the site of said hotel as compared with that of the defendant's said building and relatively to the level of said river, the defendant's counsel at the same time declaring that he meant to produce evidence to show that said Brown's Hotel was much nearer to the said river, and placed on ground much lower than the building of the defendant, and on ground of a similar description, and though a larger building than that now in dispute, and that said Brown's Hotel had stood securely for many years on its said site, which is only a short distance from that of defendant's building; which testimony being objected to, the court refused to allow said offered evidence to be given as proposed for the purpose aforesaid, and the defendant excepts, and this, his bill of exceptions, is signed, sealed, and enrolled this 5th day of November, 1857.

JAS. DUNLOP. [SEAL.]
W. M. MERRICK. [SEAL.]

Def't's 3d exception.

3d exception.

40 After the evidence stated in the aforegoing exceptions, made a part hereof, had been given, the defendant further gave in evidence that, after the plaintiff had left her said building, and after the date of his said note of the 5th April, 1852, and some time in May, 1852, she employed a skilful and competent architect and builder to examine said building, and to repair and reconstruct the same, so far as necessary and proper to make the same tenantable, and fit for use and occupation; and that the said architect and builder did, in a faithful, diligent, and skilful manner, repair and reconstruct all the damage done to said building, consequent on the sinking and settlement of the walls of the warehouse and three stores as aforesaid, and that the cost of such repairs and reconstruction to the defendant was $10,000 and one hundred dollars; and such cost was the fair value of the said repairs and reconstruction, and was bona fide made and incurred in and about said repairs and reconstruction; and there the defendant rested.

And thereupon the plaintiff gave evidence, rebutting and contradicting all and singular the evidence so as aforesaid adduced on the part of the defendant.

The defendant then prayed the court to instruct the jury as follows:

(Defendant's prayers, copied on pages 121, 122, 123, 124, &c.)

But the court rejected the said prayers, and each of them, as presented; but granted the prayer No. 4, as prayed, and also said prayers Nos. 1 and 3, with the qualification thereto attached. And thereupon the defendant excepts, as well to the refusal of the court to grant each of said prayers Nos. 1, 2, 3, and 5, as prayed by the defendant, as to the granting of the said prayers Nos 1 and 3, with the qualification thereto attached as aforesaid, and claims the same

benefit of exception as if the refusal to grant each and every of said prayers so refused, and the granting of said prayers Nos. 1 and 3, with the qualification aforesaid, were severally and respectively excepted to by separate bills of exception. And thereupon this, her bill of exception, is signed, sealed, and enrolled, this 12th day of November, A. D. 1857.

JAS. S. MORSELL. [SEAL.]
W. M. MERRICK. [SEAL.]

4th prayer of the defendant.

Defendant's 4th prayer. (Granted.)

If the jury find, from the evidence aforesaid, that the plaintiff so negligently and unfaithfully executed the work specified in the contract and specifications aforesaid, that, from insufficient drainage, bad workmanship, departure from the written specifications, or other acts or omissions of the plaintiff, in so negligently and unfaithfully executing said work, the three stores and warehouse aforesaid were damaged and injured, as stated in the evidence, then
41 the defendant is entitled to recoupe or deduct from the amount claimed in this action all damages sustained by the defendant and resulting from said injury.

Def't's 5th prayer.

Def't's 5th prayer.

That, under the issues joined on the first count of the amended declaration, the defendant is entitled to the verdict, unless the jury shall find, from the evidence, that the plaintiff did finish and deliver over to the def't the three stores and warehouse described in said written contract, ready for use and occupation, on or before the first day of October, A. D. 1851.

Rejected.

Def't's 2d prayer.

Defendant's 2d prayer.

That, by the true intent and meaning of the written contract and specifications read in evidence, the said Zepheniah Jones undertook and obliged himself to finish the three stores and warehouse therein described, and deliver them over to the defendant, fitting for use and occupation, on or before the first day of October, 1851; and the said Jones also undertook and obliged himself to procure and supply all and singular the materials, implements, fixtures, matters and things requisite and proper for the execution of said , and for the complete finishing and fitting for use and occupation of said warehouse and stores. And if the jury find that the said warehouse and stores, when delivered over by said Jones to the def't, were not fitting for use and occupation, but the same were defective, unsafe, and untenantable, by reason of the cracking of parts of the walls and settlement of portions of the store walls, or otherwise; and if the jury further find that it was possible for said Jones to have constructed said warehouse and stores, and to have delivered the same to the defendant fitting for use and occupation, by his furnishing additional labor, materials, matters, and things, (not named in said written specifications,) in and about the fitting of the same for use and occupation, then the said Jones did not perform and discharge the obligation of his said contract, although the jury may believe that the said warehouse and three stores were erected and constructed in strict conformity to the specifications made a part of said contract; and although the cracking of said walls and settlement of said foundations may have resulted

from causes wholly unforeseen by either party at the time of executing said contract and constructing said foundations and walls; and although the said cracking and settlement may have been caused by the weight placed on said walls and foundations, or some part thereof, according to the requirements of such specifications, or of additional weight placed on the same or some
42 part thereof by said Jones, at the request of said defendant, and which additional weight was not called for in said specifications; but the court further instructs the jury that the plaintiff is entitled to recover nominal damages at all events.

Refused.

Def't's 1st and 3d prayers, with the qualification.

Prayer No. 1.

And thereupon the defendant prayed the court to instruct the jury as follows: If the three stores and warehouse in the contract mentioned were not executed and finished, fit for use and occupation, and so delivered to defendant, either on the said first day of October, 1851, in the said contract mentioned, nor at any other time, but were, at the time the same were delivered, wholly unfit and unsafe for use and occupation, with walls, or some of them, sunken out of plumb and cracked and in danger of falling, so as to be utterly untenantable and unfit for use and occupation, then the plaintiff was not entitled to demand and recover in this action the said sum of five thousand dollars, as the stipulated instalment which the said contract purports to make payable on the said 1st Octo., on the terms and conditions therein mentioned, but the plaintiff is entitled to recover the value of his said work, after deducting the cost and expense incurred by the defendant in repairing said stores and warehouse and rendering them fit for use and occupation, but the plaintiff is entitled to nominal damages at all events.

Def't's 3d prayer.

If the defendant did not at any time or times whatever execute, finish, ready for use and occupation, and in that state and condition deliver over to the defendant the said stores and warehouse mentioned, but delivered the same over to the defendant in a state wholly unsafe and unfit for use and occupation, and untenantable, with walls sunken, cracked, and out of plumb, and in danger of falling into ruin, whereby the defendant was greatly injured and suffered great loss, by having to reconstruct the said walls in part, and repair the dilapidated condition of the building, and fit it for use and occupation at her own costs and charges, then the defendant may recoupe or deduct said losses, costs, and charges against the plaintiff's claim for the said instalment of five thousand dollars, claimed in this suit, or the value of the work done by said plaintiff in and about said stores and warehouse, but the plaintiff is entitled to recover nominal damages at all event; which instructions the court refused to grant without the following qualification, that is to say:

Qualification.

43 But if the jury shall find from the evidence that the said Jones hath executed the said work according to the specifications forming a part of the said contract, and in a skilful, diligent, and careful and workmanlike manner, or that his execution thereof was with the knowledge and approbation of the defendant, then they are to find for the plaintiff the said sum of $5,000, with interest from the date of the delivery of the said stores and warehouse.

To the granting of which instructions the plaintiff excepts, and prays the

court to sign and seal this his bill of exceptions, which is accordingly done, this 11th day of Nov., 1857.

JAMES. S. MORSELL. [SEAL.]
WM. M. MERRICK. [SEAL.]

To the refusal of which instructions, as prayed by the defendant, to the granting of the qualification annexed thereto, the defendant, by her counsel, excepts, and claims the same benefit of exception as if the refusal of the court to grant *to grant* each of said instructions as prayed, and the granting of the same with the qualifications thereto attached, were each separately excepted to, and thereupon this her bill of exceptions is signed, sealed and enrolled, this 11th day of Nov., 1857.

JAMES S. MORSELL. [SEAL.]
WM. M. MERRICK. [SEAL.]

Letter from Zepheniah Jones to Miss Dermott, referred to in defendant's 1st exception, page 108.

WASHINGTON, *Dec. 4th*, 1851.

Miss ANN DERMOT:

MADAM: After having waited several days to see you on the subject, I hereby inform you that the three stores in the south front of your building are ready, and have been ready some days, for occupancy, and that the store and warehouse on 7th street will be ready also to-day or to-morrow. You can, therefore, at once take possession, and I am ready to give up the keys.

Very respectfully, &c.,

Z. JONES.

Letter from Zepheniah Jones to Miss Dermott, referred to in defendant's 1st exception, page 108.

Miss ANN R. DERMOTT:

MADAM: I am ready to deliver the keys of your building to you, or any person that you may name.

Yours, Z. JONES.

April 5th, 1852.

Articles of agreement referred to in defendant's pleas, page 29.

44 The articles of agreement made on the twenty-second day of April, in the year one thousand eight hundred and fifty-one, beween Zepheniah Jones, of the city of Washington, mason and house-builder, of the one part, and Ann R. Dermott, of the same city, of the other part, witnesseth: That the said parties have mutually covenanted and agreed, and by these presents do mutually covenant and agree together, each with the other, in manner and form following—that is to say: that he, the said Jones, shall and will well and faithfully do, perform, and execute in good, substantial, and workmanlike manner, and in a neat style of finish, such as is proper to the sort and kind of work in its various details, all and singular the houses, buildings, and work of every sort and kind described and specified in the schedule hereto annexed, and marked A, and which, together with all its appendages and details, is to be taken and regarded as part and parcel of these articles of agreement, being authenticated by the signatures of the said parties, and the attestations of the same witnesses as these present, comprehending all the work and labor of every sort necessary and proper for the pulling down and removal of the houses and buildings standing, or lately standing, on the lot referred to in the said schedule,

and for the removal and clearing off all the old materials and rubbish, and for the rebuilding and completion of the new houses and buildings to be erected on said lot according to the specifications of said schedule.

That he shall and will also procure and supply, or cause to be supplied and procured, all and singular the materials, implements, fixtures, matters and things requisite and proper for the execution of the said work in all its parts and details, and for the complete finish and fitting for use and occupation of all the houses and buildings, and the several apartments of the house and buildings, to be erected pursuant to the plan of the works described and specified in the said schedule; that the said work and works, and the several parcels and parts thereof, shall be executed, finished, and ready for use and occupation; and be delivered over, so finished and ready, to the said Ann R. Dermott, at the time and times following—that is to say, the three stores described in said schedule as fronting on market space, and the warehouse on 7th street, on or before the first day of October next, and all the residue of the said work on the first day December next, and that he shall and will forthwith prosecute and carry on the said works with all diligence and practicable expedition.

That the said Ann R. Dermott, in consideration of the covenants and agreements on the part and behalf of the said Jones to be performed and executed as aforesaid, and of the due performance and execution of the same, and in full payment and satisfaction for all the work and labor aforesaid, and for all the materials, implements, fixtures, &c., to be by him procured and supplied as aforesaid, shall well and truly pay him the full and just sum of twenty-four
45 thousand dollars, by the instalments and at the time and times following—that is to say, five thousand dollars on the first day of July next; the further sum of five thousand dollars on the first day of October next, the said stores and warehouse being then finished and ready for use and occupation, and delivered over as above mentioned and agreed on; and the residue of the said sum of twenty-four thousand dollars, to wit, fourteen thousand dollars, on the first day of January, A. D. 1860, with interest as follows—that is to say, four thousand dollars, part thereof shall bear interest from the first day of May next, and the residue from and after the complete execution, finish and delivery of the said work on the first day of December next; and all such interest shall be paid quarter-yearly—that is to say, one-fourth part of the yearly interest shall be paid at the expiration of every quarter of a year from and after the time when the same shall begin to run; that on the complete execution, finish, and delivery of the said work on the first day of December next, as aforesaid, she, the said Ann R. Dermott, shall give her bond to said Jones for the due payment of the said sum of fourteen thousand dollars payable on the said first day of January, in the year 1860, and the interest payable as aforesaid, and shall also give collateral security for the same in and by a deed of trust upon the property on which he has agreed to execute the works specified in said schedule, in which deed there shall be inserted, among the other matters usual and proper in such instruments, a clause empowering and requiring the trustee in such deed named to collect and receive from any tenant or tenants of the said premises every such portion or instalment of said interest as shall be and remain unpaid and in arrear for the space of twenty days after demand and refusal of the same; and as a still further security for the said sum of money and interest, that the same shall constitute and remain a good and valid lien on all the said property, according to the provisions of the act of Congress in such case provided; but no such lien shall exist, or be or inure to the benefit of any person or persons whatsoever other than said Jones, his executors, administrators, under any pretence of work or labor done or materials supplied by his procurement for the execution of his contract and agreement aforesaid; and he shall make all his contracts for such work, labor and materials, on his own individual and personal account and

credit, and so as to forefend all claims on the part of any person but himself to any lien or liens on said property.

In witness whereof, the parties aforesaid have hereto set their hands and seals the day and year aforesaid.

ZEPHENIAH JONES. [SEAL.]
ANNE R. DERMOTT. [SEAL.]

Witness:
WALTER JONES.
JOHN C. HARKNESS.

46 I hereby certify that I have carefully compared this copy with the original contract and find it correct.
October 15th, 1851.

JOHN C. HARKNESS.

Sched. A.

Specifications constituting the Schedule A referred to in the aforegoing articles of agreement for the erection of certain brick buildings on lots numbered one and twelve, in square numbered 432, in the city of Washington, for Miss Ann Dermott.

Removals.—Every part of the old brick buildings to be removed, except the west wall, which forms the party wall of the adjoining house, and such of the stone foundations as are conformable to the accompanying plans; no portion of the old material, or manufactured portions of the old building, to be used again in the construction of the new buildings, except the brick foundation stone; the marble mantels, soapstone jambs, and backs to fireplaces, two grates, and such of the freestone window-sills as are perfect to be used to the back windows.

Excavations.—The corner lot and the alley to be dug out to an average depth of 7.11 below the grade of the pavement at the building line south front, (provided the bottom of the sewer will admit of it,) to be so graded that the water from every part of the floor shall drain to the sewer; the excavations of the vaults and area to be made to conform with the grade of the cellar, so as that all shall drain to the sewer; the cellar under the warehouse to be dug out to an average depth of 7.10½ below the grade of the pavement, at the centre of the front, at the building line, and to be so graded as to drain the water to the sewer. The area to the warehouse to be dug out 8 feet deep; trenches for the new foundations to be dug out 3 inches below the bottom of the cellars, all the earth to be carted from the premises, and all the offal from the old buildings also.

Brick work.—The dimensions, arrangement, and number of brick walls are laid down upon the accompanying plans, which plans are to be regarded as a part of their written specifications, except in so far as said plans may be modified by their written specifications. The south and east walls of the corner house to be 2 brick thick up to the first floor of joist: the east wall from thence up to the second floor of joist 2 brick thick; from thence up to the square, as also the south wall, 1½ brick thick; the basement south and east wall up to the granite water-table to be faced with good red brick of a uniform color, and from the water-table up to the cornice to be faced with best quality Washington front brick, (or their equivalent,) laid in neat tucked joints, oiled and penciled. The main division wall to be 14 brick thick up to the first floor of joists; from thence up to the raising floor of joists 1½ brick thick; the wall along the south
47 side of the alley to be 18 inches thick, (and to project 4½ inches into the vault for the support of the arch,) as high as the first floor of joists; from thence up to the second floor of joists 14 inches thick; the walls on the west, above the skylight, to be 9 inches thick, faced with red brick, and finished with a plain four-course brick cornice; the cross wall in the cellar, dividing the stores from the kitchen, to be 9 inches thick, starting from a 14-inch footing of

4 courses, and to finish even with the top of the first floor of joists. The east wall to be arched over the alley, as per drawing, to unite with the warehouse, and to finish the same as described. The west wall over the alley to be arched at the same height as the front, to be 9 inches thick, and to finish with a plain brick cornice, even with the third floor of joists; the main division wall to be arched over the alley on 3 bars of iron 2½ in. x ⅜ bent, to suit the curved of the arch, and turned up at the ends to prevent spreading; the main west wall to be arched over the alley in the same manner, even with the ceiling of the second story, on two bars; all the chimneys and flues to be constructed upon the most approved plan to prevent smoking; the flues to be 14 x 14 in all, well pargetted and capable of being *sweeped*, to be taped out 3 feet above the cone of the roof; th swinging chimneys to be supported by trimmer arches laid on 4 iron bars to each, of 2 x ½ inch, curved and lapped into the joist; the fireplaces to be cased, and hearths laid with front bricks; the kitchen hearths to be laid of best paving brick, on very strong Susquehanna slate, bedded in cement on the top of the stone pavement, to be 2 feet wide from the buaist and even length with the chimneys; the fireplace to be provided with a suitable iron crane and are bar; the front cornice to be of full trimmed, moulded brick, to extend the entire lengths of the east and south fronts, with returns at each terminus, formed of cast iron. The brick work of the warehouse to commence for the outside wall even with the bottom of the first floor of joists; to be 18 inches thick up to the top of the second floor of joists, and from thence up to the square 14 inches thick; the first story to be so graduated as to keep the second floor on the same level with the second floor of the corner house, observing to set the top of the north sill 3 inches above the grade of the pavement; the front wall and the north and south walls, as far as the depth of the corner house goes, to be carried up the same height of the corner house; the rest of the south wall, to finish even with the top of the fifth floor, with a plain four-course cornice, and the north wall carried up 3 feet for the pitch of the roof 9 in. thick; the dividing walls in the cellar, as shown on the plan, to be 9 in. thick, starting from 14½ footings 4 courses high, and to finish with the top of the first floor of joists; 4½-inch piers to be constructed, 2½ brick long, on each side
48 of the centre wall, directly under each iron column, with blue rock footings and caps; the chimneys and flues attached to the warehouse to be constructed and finished before described. The alley to be arched over from the building line to the west line of the corner lot; the arch to be 9 inches, laid in cement, to rise 1.8 inches, and to be placed as near the surface as is prudent; a communication to be formed, as shown on the plan, by 9-inch walls, with the back cellar of the warehouse. Two strong cast-iron curbs, 15 inches in diameter, to be firmly worked into the ceiling of the vault and secured with strong wrought-iron gratings, made portable and fastened on the inside with padlocks and chains. A coal slide to be constructed from the side of the alley into the back cellar of the warehouse, to be cased with even-faced blue rock or N. York flagging, secured with wrought-iron gratings and padlocks and chains. Three vaults in the south pavement, to be 9.8 x 8.0 in the clear; the front side and division walls to be 9 inches thick; the back wall 14 inches thick; the arches to rise 18 inches, and to be 9 inches thick, brought up as near to the surface as is prudent; to be laid in cement mortar. Each vault to have a cast-iron curb firmly worked in the arch, with close cast-iron covers, fastened as before described. The backings of all the vaults to be of clay puddling. A drain to be constructed of brick laid in cement, 18 inches wide on the bottom, open at the top, as deep as the sewer will allow, to pass from the space under the skylight along the division wall in the kitchen, under the floor, to the front area.

The area and vaults in the south pavement to be paved with the best quality paving brick, and so graded as to lead the water to the sewer. The cellars of both houses and the vault under the alley to be paved with stone similar to that

used on Pennsylvania avenue, in coarse sand and gravel, sufficient to produce the grades required, and to be solidly rammed. The sewer to *be* extend and brought with an easy curve to the face of the area wall, directly under the front steps, and the mouth to be secured by a hinged iron grating. The space under the skylight to be paved with best paving brick, and graded so as to drain the water into the drain before described. A brick sewer, to be laid in cement, 6 x 6 in the clear, from the privy to the front sewer; and that portion of the sewer which passes over the vault under the alley to be of 6 in. cast-iron pipe, leaded at the joints to prevent leakage; a connecting drain to be brought from the back down-spout into this sewer.

A privy to be built on the west line of the warehouse lot, 18 ft. 6 inches long x 6.8 ft. broad outside of the walls; the walls to be 9 inches thick, starting from blue rock footing, 1.6 x 1.6, to be 18 feet high from the footings to the square, the roof to rise 9 inches. An additional privy of the dimensions of one of the divisions to be built one story high only. The privies to be connected with the warehouse by a similar wall and footings as described for the
49 privy, to be of even height with the privy, and coped with brick laid in cement.

The back yard of the warehouse to be paved with stone. The alley to be repaved from the west line of the vault to the gutter at 7th street. The entire front line of east and south fronts to be paved with best quality paving brick on 6 inches of coarse sand brought to the right grade. Neat jack arches over all openings in walls, faced with *red* brick; dead arches turned whenever necessary for strength. The north line of the lot behind the warehouse and the return to the privy to be enclosed by a brick wall 8 ft. 6 in. high from the bottom of the foundation to the top; to be 9 in. thick, with 14 in. footings 18 in. high, and coped with brick laid in cement.

A drain 6 x 6 in. to be made of brick laid in cement, to conduct the water from the area of the warehouse into the area of the corner house, (carried along against the east end of the vault under the alleys.) The west party wall to be built upon of its present thickness, and brought up to the height required by the plans. The gable peaks to be 9 inches thick, cut up under the slate, and finished with a two-course barge. Foundations to the front entrance steps put up in the best manner. The old brick to be properly cleaned, and such as are fit to make a good and substantial job to be used again; the *ballance* necessary to complete the building to be of the best quality merchantable all hard brick; no *sammon* to be allowed in any part of the building, nor any of the dry-pressed bricks. The mortar to be made (except where cement is before specified) of the best quality wood-burnt Potomac lime, and all sharp sand, in due proportions. The contractor to furnish all the necessary scaffolding.

Stone work.—All the area walls to be built of best quality blue rock, laid in cement mortar, 18 inches thick, neatly faced and pointed, and brought to the true grade for the reception of the granite coping. The walls under the columns at the skylight to be 22 inches thick, laid in cement mortar, and brought up to the proper height for the columns to set upon, having suitable stone immediately under each column. The footings for that portion of the walls which extends beyond the old walls to be laid in the best manner of blue rock, two feet thick and foot high. The footing for the division-wall to be 22 in. thick and foot high. The footing of the wall along the south side of the alley to be 18 in. thich and one foot high. The walls of the cellar to the warehouse, on the south, west, and north, to be of blue rock, 22 inches thick up to the level of the joists, and the front wall up to the level of the cellar floor. The *ballance* of the front wall of cellar to be of brick 22 inches thick. The foundations to privies and connecting wall to be of blue rock laid in mortar, 18 inches high and 18 inches thick.

50 *Granite work.*—The window-sills to the basement and all other parts

of the outside of the building, except for the fronts above the basement, to be of granite, 8 inches broad and 5 inches thick; the top face to be bevelled clear through, and the bottom to be grooved for a water drip.

2	door-sills on the alley, south side	4.7	long,	12 x 8 in.
2	" warehouse	5.0	"	15 x 8 "
1	" "	3.4	"	12 x 8 "
2	" south store front	6.10	"	16 x 8 "
2	" " "	9.0	"	16 x 8 "
2	" " "	6.6	"	16 x 8 "
2	p eces water-table "	1.7	"	8 x 6 "
2	door sills, east "	6.4	"	16 x 8 "
1	" " "	6.0	"	0 x 0 "
2	" warehouse front	6.6	"	16 x 8 "
2	" " "	6.0	"	16 x 8 "
2	pieces water-table, warehouse front	1.0	"	8 x 6 "
2	platforms, south front	6.4	"	5.11 x 8 "
1	" "	6.0	"	5.11 x 8 "
2	" warehouse	6.6	"	5.11 x 8 "
1	" under front steps, which can make two pieces	7.6	"	5.9 x 8 "

1 platform to front entrance....8.6 long, 5.11 x 8, moulded.

7 winding steps to front entrance, the bottom one to have scroll ends.... 5.0 long, 8 in. rise.

9 straight steps, 5 feet clear of the wall, 13 in. wide, and 8 in. rise, ribbeted and rounded underside, and securely fastened to the wall. The front of steps, as far as the windows extend, o have granite panels formed in the granite ashlar; the other two sides for the same distance to have plain granite ashlar; two granite columns, neatly cut, of the Tuscan order, with moulded caps and bars. The whole height, including caps and plinths, to be 9 feet more or less, and of due proportions. The plinths to be 17 in. x 17 in. x 12 inches.

135	feet of coping to area walls	12 in. x 8 in.
10	" " quarter circle, radius 6 ft	12 x 8
54	" water-table	8 x 6
188	feet, lineal, of curbstone	1.6 x 6
9	privy door-sills	2.9 x 10 x 6 in.
3	spout stones	2.6 x 1.4 x 6 in.

The foregoing dimensions are the net sizes; consequently, on all the work requiring rests in the walls or rabbets, due allowance is to be made therefor, so as to render all the platforms and steps perfectly secure.

51 All the granite to be of the best quality Baltimore blue, and all the parts requiring it to be of the best quality fine work. The joints of the coping to be secured by iron clamps imbedded in lead. All the usual and necessary clamps and arches uniting the granite with the brick work to be done in a faithful manner.

New York blue stone.—

1	door-sill,	4.8	long, 15	in. broad, x 5	thick	Corner basement.
1	"	6.3	" 15	" x 5	"	
1	"	3.6	" 15	" x 5	"	
2	"	4.8 x 12		" x 5	"	Warehouse.
1	"	3.6 x 10		" x 4	"	
5	"	3.3 x 10		" x 4	"	vaults.

The coal slide to be cased on the front and the two ends with N. York stone, 3 inches thick.

The old door-sill and step to be fitted up for a carriage step to main entrance.

Marble work.—All the front windows, except those in the basement, to have marble sills 5 x 8 in., made as described for the granite; the sills for the side-

light windows to be 7 in. thick, and made in one piece. All the windows except the side-light ones to the fronts to have plain marble heads, 8 inches broad, 4 inches thick, and to extend 4½ inches on the brick work each side; the heads and sills to be made of the white marble as used at the Patent Office—best quality. Three new marble mantels to be selected by Miss Dermott, cost, when set complete, not to exceed fifty dollars each. The three old marble mantels to be put up again in the best manner. The front entrance sill 6.4 long, 18 inches broad, and 8 inches thick, of the crystal marble.

Iron work.—The south store front, and the west wall over the skylight, to have girders of cast iron of the same description as those used at Mr. Winder's building, omitting the top flange; the girders to the south front to have the bottom flange 13¼ in. wide, and the girders at the skylight 9¼ wide.

The south front to have four cast-iron columns, 8 inches diameter at the base, neatly fluted and with handsome caps. The girder at the skylight to be supported by four columns of the same description 7 in. diameter. The store fronts on 7th street to be formed of neat and plain cast-iron posts and girders suited to 14½ walls, and conformable to the plan. A wrought-iron railing enclosing the balcony, and one cross inside division, and also to area; granite platforms and front steps to be of the same style of that at Mr. George Parker's dwelling; the brackets to balcony to be of plain wrought-iron or ornamental castings as Miss Dermott may prefer; the posts to the area railing to be neat cast iron, 6 in. diameter, bolted to the coping.

52 The space left of the area to warehouse to be enclosed with a wrought-iron hinged grating, similar to that used at Leonard Harbaugh's house, 7th street. Six of the second-story windows north of the main entrance to have handsome cast-iron guards, similar to those in G. R. Gather's house, 13th street; 4 cast-iron columns 7 in. diameter, and 4 do. 6 in. diameter, neatly cast as before described, to be used in the first and second stories of the warehouse. Three cast-iron curbs, with close cast-iron covers, and two do. with wrought-iron gratings, to be worked in the arches of the vaults as before described; a wrought-iron grating to be made to the coal slide, hinged on pivots, and fastened with padlock and chain; four superior irons 2 x 078, of suitable curve, and caps to be used to all the chimneys which are suspended upon trimmers; a wrought-iron grating to the mouth of sewer as before described. The tin spoutings brought to the pavements to have cast-iron terminations.

That portion of the sewer passing from the privies over the vault under the alley to be of 6-in. cast-iron pipe, caulked and leaded, with a branch connection with the back rain pipe; 80 wall irons to be used in connecting the walls; the floors to be distributed in the most judicious manner; snow-irons to be used to all the eaves except to the tin roof. The straps and bolts to the gallows, and forming under the warehouse roof, to be of the usual size and description used for principal rafters. The two old parlor grates to be carefully preserved, with the casings, and reset when the building is ready to receive them; and three new grates, of such pattern as Miss Dermott shall select, the cost for each not to exceed twenty dollars. The returns to the brick cornice to be of cast iron. The sliding frame to dumb-waiter to be of wrought iron of suitable dimensions, and sheaves and cords in a complete manner. The arch *barrs* over the alley, hung with dedescribed under the head brick work, to be of the best quality iron, and regularly curved, rising the full breadth of the joists. Two iron dowells to be used to each jamb of the door frames, having stone sills; and arch bar and crane provided for the kitchen fireplace, as before described. The flues connected with the stoves to have *to have* a sheet-iron door or slide, made tight and hinged, or made portable, so that a sweep may enter and clean the chimneys. Iron holdfasts put to all the wood mantels.

Hardware.—The wrought or cut nails used to be the best quality. All the blinds to be hinged with Plant's best self-fastening parliaments, with sill-catches.

All the doors to be hung with best quality slip buts, to average 3½ x 3½, and in all cases where necessary to be sufficiently broad to swing the door clear of the casings. The door locks in the basement and fifth stories to be of the quality cottage, or lock with best quality dark mineral knobs and bronzed fumature. The door locks in the second story to be best American mortise, with plated knobs and fumature. The third and fourth stories to have the
53 same description of locks, with pearl knobs and plated fumature. The store door locks to be of the best quality usually used for stores. All the closets to have best spring and tumbler locks, and suitable bolts and hooks. All the vault doors to have best stock locks, with brass bolts and keys. Best 2-inch axle pulleys to be used to all the box frames. The sashes to the box frames to be hung with round weights and best Russia sash cords. The sliding doors to have brass railways and 6-in. sheaves; mortise locks and flush bolts where necessary. All the bolts and other fastenings usual to the doors and shutters to be of the best quality and most approved kinds. Best quality front door lock, with stop to knob and night key, plated knobs (and largest class fumature.)

Plumber's work.—One reservoir, 10 feet long, 4.6 wide, and 3 feet deep, to be lined with lead, (3 lbs. to the superficial foot,) to be placed up to the ceiling of the fourth story of the warehouse immediately over the ladies' water-closet, with a waste-pipe of such dimensions as will insure it from an overflow. One other reservoir, 8 feet long, 4.6 wide, and three feet deep, to be lined with lead as before described, and provided with a suitable waste-pipe to prevent an overflow; from this reservoir the water is to be conducted into the kitchen with an ½-inch lead pipe, with a brass cock in the kitchen, third, fourth, and fifth stories, and to each a plain receiver or sink, with waste-pipes attached, conducting the water into the area under the skylight; the receivers to be lined with lead same as the reservoirs, to be 2 ft. long, 1.3 broad, and 4 in. deep; the sink or reservoir in the kitchen to be 3 ft. long, 2 feet broad, and 6 in. deep.

Four water-closets, to be fitted up in the fourth story of the warehouse, in the most approved style, with self-acting seats; the soil-pipe to be of lead, 5 in. diameter, to pass from the ladies' closet down the southwest angle of the warehouse until it reaches the level of the brick wall which connects the privies in the back yard with the warehouse, to pass along said wall over to the said privies, to pass down the southwest angle of the privies low enough to pass under the seats, and along the seats at an easy and safe inclination, to the northwest angle of the privies, and from thence down to the box below; lead funnel connexions to be made from the four seats in the second-story privy to the soil-pipe. A slop closet to be constructed adjoining the ladies' water-closet, and connected in the best manner with the soil-pipe.

Bell-hanging.—Forty-two bells, to be secret, hung in zinc or copper tubes, the cranks to be so adjusted as to produce the best possible friction or strain on the wires. The pulls in the several stories to correspond with the style of fumature to door locks in the several stories. All the bells to be arranged upon a neat board fastened to the wall in the kitchen, and designated by painted numbers on or under each bell.

54 One speaking-tube, secreted within the plastering, to communicate between the dining-room and the kitchen, the tube to be made of tin of ¾ in. bore, with German silver or block tin mouth-pieces at each end.

Tin work.—All that portion of warehouse roof extending westward beyond the west line of the corner house to be covered with the best quality roofing tin, put on with upright grooves, and fastened securely to the sheathing. The roof to the gentlemen's water-closet, and that portion of the roof covering the back stairs at the skylight, to be covered with the same description of tin. The framed wall of warehouse running above the tin roof to be covered with the same quality of tin, put on with flat joints. The back gutters to the eaves to be of the No. 1 class of tin gutters, made in the usual way, the pipes to be

c
onducted to the reservoirs, and waste-pipes of a corresponding size to lead the waste water from each reservoir down to the yard.

Carpenter's work.—The joisting throughout the building to be of North Carolina timber, those of 1st and second floors of the warehouse to be 3 x 12, placed 14 inches from centres; the first floor of the corner house to be 2½ x 12, placed 14 inches from centres; all the rest to be 2½ x 12, placed 15 inches from centres; the ceiling joists to be 2½ x 6 in. of N. C., placed 15 inches from centres; double joists pinned together to be placed under all plastered partitions which run parallel with the joists. All trimmers to be of double joist pinned together; the sleepers under the floors of the basement to be of 2 x 4 N. C., placed 20 in. apart. One row of double street bridging to be put to all the floors of joists, except that portion west of the division wall between the turn of the corner house and the skylight, which portion, the joists being long and partitions across do., will require 2 rows.

The rafters to be 8 inches at the bottom, 5 inches at the top, and 3 inches thick, placed 20 inches from centres, secured by 2 x 4 tie and raising plates, all of N. C. The rafters for the tin roof over the warehouse to be of N. C., 3 x 4, and braced to the joists; the back wall of the fifth story over the warehouse to be framed of N. C., the studs to be 3 x 6, the posts 8 x 6, the braces 6 x 6, the girder 7 x 12, and plate 6 x 6, to be framed, braced, strapped and bolted, upon the same principle as a principal rafter. All the sheathing to be of sound, well seasoned, ¼ common white pine culls, laid in close joints. All the flooring to be of well-seasoned ¼ mill-dressed N. C.; the basement to be all heart, the balance to be of a good merchantable quality, selecting the best for the boarding-house floors. All the partitions to be of ¾ Eastern Shore, or of hemlock, placed 16 in. from centres, and in all cases, where necessary for strength, to be framed and braced. All the wood lintels to be proportioned to the size of the openings, and none less than 4 inches thick, except over the
55 windows, 2 lights wide; the lintels over the main entrance and side light windows to be of N. C. equal to the thickness of the walls.

Basement.—The walls and ceilings to the storeroom to be ceiled with white pine ¼ thick, ripped, dressed, tongue and grooved, and beaded, to be nailed on the walls; N. C. strips ⅝ thick, and 3 inches wide, nailed into plugs, and placed 2 ft. from centres; the windows in the front to be 3 ft. 4½ wide, and 4.6 in. high in the clear; frames made of 2½ x 6 N. C. or white pine, with sash and shutter rabbets; the sash to be ¼ thick, made in two folds, slights each fold, hinged with 2½ slip buts, and fastened with 6 in. square bolts; the shutters to be of ⅝ white pine, made square on the inside, and beaded, and flushed on the outside, hinged with Plant's best self-acting hinge, and fastened with a 6 in. sill-bolt, and a middle slip bolt to each window. The jambs to be of ¼ white pine splayed, ⅝ nosed seats. The door-frames to be made of 2½ x 8 N. C., with ¼ splayed jambs. The door to the corner house to be 4.0 x 6.8, made in two folds, two thickness, with sash and portable shutters, made and fastened with the usual screw and stubb bolts. The door in the west room to be made in two divisions, each 2.8 x 6.8, made in close bead and flush pannels of ⅝ white pine, and fastened with top and bottom wrought-iron bolts, 10 in. long. A passage to one of these doors partitioned off with ¼ flooring boards 10 ft. long and 4 ft. wide, for the use of the small store, with a strong step-ladder from do., and a suitable trap-door in the store floor. The outside kitchen to be 3.0 x 6.8 of ⅝ white pine, single moulded, frame made as before described. Two neat flight of stairs, with mahogany rail, turned oak ballusters, and oak newels, to communicate, as per plan, with the main store. The openings shown on the plan of the kitchen in the division walls to be cased with ¼ beaded casings. The two openings leading into the space under the skylight to have ¼ framed and sash doors without shutters, to be 2.10 x 6.8 in the rabbet. A plain and substantial stairs, as per plan, to commence on the kitchen floor, and to continue

up through the several stories, as shown on the plan, to the fifth story, cherry hand-rail, plain ballusters, and turned newels whenever necessary, $\frac{5}{4}$ y. pine steps, $\frac{4}{4}$ risers and plain mitred string.

A dumb-waiter, to be formed of $\frac{5}{4}$ tongued and grooved boards, put up vertically, to be 3.6 x 3.6 in the clear, and to extend from the kitchen up to the fifth story of the building; the sides of the boarding next to the rooms to be stripped, and lathed and plastered, communicating doors to be made to each story, and in the fifth story the boarding to terminate 2 ft. 6 in. above the floor, and enclosed at the top with a $\frac{5}{4}$ folding battened door. The sliding frame to be made of iron with a portable wooden tray to fit on do., and worked with judiciously arranged sheaves, cords, and cranks, put up complete.

56 A neat and substantial kitchen dresser 8 feet long, the main shelf to be $2\frac{1}{2}$ feet wide, $\frac{6}{4}$ thick, of merch. white pine, and placed 2 ft. 8 in. above the floor, the space under the main shelf to be formed into two closets, with pannel doors to each; the space above to be divided by two shelves 1 foot wide. The wash-boards to be confined to the kitchens to be 6 in. wide, square edged, put up after the plastering. The doors and windows to be trimmed with a 3-inch band moulding.

First story.—The south store fronts to be made according to the plan, of the best material and workmanship; the girders to be of cast iron, and supported by cast-iron columns, as described under the head of iron work; the doors to be of two thicknesses of $\frac{6}{4}$ merch't white pine with moulded portable shutters, and provided with best quality brass screw-bolts, iron lifts and stubb-bolts 10 in. square bolts at the bottom, and spring and chain store-door bolts at the top; the sash frames to be made of $2\frac{1}{2}$ N. C., free from pitch, to be secured with $\frac{6}{4}$ moulded panel shutters as described for the doors, to be trimmed with pilasters and cornice as shown on the plan; the inside to be neatly cased with the usual bedded casings, fatias and panelled soffeits, and enclosed on the inside with $\frac{6}{4}$ sash doors, and divided into moderate size panes of glass, hinged and fastened with buttons, the usual bottom show-shelf to be put in each window. The east store front to have plain cast-iron posts and girders, with double cast store doors and shutters, put up as is usual to granite fronts; two doors on the alley communicating with the stores, to be 4.0 x 8.6 in the rabbets; frames to be of $2\frac{1}{2}$ N. C., and the doors to be made as described for the other store doors; one door to communicate with the kitchen stairs from the alley, to be 2.10 x 8.6 including the transom; the frame to be of $2\frac{1}{2}$ N. C.; the door to be in 4 panels, bead, and flush; one window, 12 light, 8 x 10, to light the space under the skylight; the frame to be solid, with sliding sash made in two flight. The floor under the skylight to stand clear of the brick wall at least 6 inches, and to be boarded up with all heart N. C. $\frac{5}{4}$ board, dressed, tongued and grooved, secured at the top by a $\frac{3}{4}$ N. C. plate grooved to receive the boarding. The skylight sash to be framed of $2\frac{1}{2}$ N. C. divided as per plan, with bars one inch thick, with channels cut in the rabbet bed, thus, , to extend from the stairway on the north to the return back wall of the front building, forming a valley at the turn with a tongued and grooved joint, well painted with white lead; the sash to decline two feet, and secured in a substantial manner at the top and bottom to prevent leaking. The walls at the skylight to be secured and supported by cast-iron girder and columns as described under the head of iron works. The wash-boards to be 7 in. wide, of $\frac{4}{4}$ selects, put up after the plastering, the trimmings to be a plain architrave. The partition dividing off the small west store

57 to be of $\frac{4}{4}$ y. pine, dressed both sides, and tongued and grooved and beaded, put after the plastering.

Second story.—The front windows to be 15 light, 12 x 20 sash, double box frames of $\frac{6}{4}$ white pine, with the usual boxings for weights and for the sliding of the sash above the frames; the back windows to be 12 light, 12 x 20, double box; the windows to have $\frac{8}{4}$ mortise blinds complete, to be trimmed with splayed

jambs, opened face $\frac{6}{4}$ pilasters, 8 in. wide, with moulded caps, plain bans, frieze and cornice, with broken bed moulds; the dining-room windows to have $\frac{6}{4}$ seats and open aprons; three sets of sliding doors, made and arranged with two divisions to slide and two swing on hinges, to be made as broad as the width of the room will allow, and of the same height as the windows; the doors to be $\frac{5}{4}$ thick, each fold divided into four panels, double moulded with handsome Grecian mouldings, the trimmings to be same as described for the windows. The other doors to average 7.4 x 3.2, made in four panels, $\frac{5}{4}$ thick, double moulded and trimmed as before described; the jambs to be $\frac{8}{4}$ white pine in the stud partitions, and opened in the brick partitions. The front entrance to be a recessed doorway, finished in the same style as that of Mr. Lawrence's, on E street. The inside steps at the front entrance to be of best N. C., free from pitch, $1\frac{1}{2}$ thick rise, of $\frac{5}{4}$ yellow pine, to extend across the passage, and so arranged as to project as little as possible below the store ceiling. A handsome staircase, as per plan, to commence on this floor and to continue up to the fifth story, the steps and risers to be of the best quality $\frac{5}{4}$ N. C.; open scroll brackets, ornamented fatias; oval mahogany hand-rail; turned and moulded oak ballusters; moulded open-faced skirting, and the walls around the windows studed out with $\frac{3}{4}$ studs to a cornicineular form; the spand-rail to be single moulded, panelled, and a closet formed under the first flight of steps, and the windows to have a sash-door to do., 6.10 x 2.10, with a tramer over do., as large as can be used to look well. The closets at the end of the dining-room to have panel doors, $\frac{6}{4}$, single moulded, and made in folds, to be shelved in the usual way, arranged from 16 in. to 12 in. apart, starting from the bottom shelf, $\frac{6}{4}$ thick and 18 in. wide, placed 3 feet above the floor. A suitable hinged sash to be put each closet, secured by a gauze wire covering. All the mantels required in this story besides the marble ones specified, to be of a neat marble pattern, made of clear, well seasoned white pine. The washboards to be 12 inches wide, including the moulding, opened on the top edge two inches, and the moulding two inches, and put up to grounds. The carpet-sills and hearth-borders to be of mahogany, of the usual width. Three windows to Miss Dermott's rooms, to have inside shutters in five folds, cut in three pieces; the wall to be studded to suit do.

Third story.—The windows to be 12 x 18, double box, 12 light, except
58 those in the small rooms over the dining-room, which are to be 8 light, 10 x 18, made as before described, with blinds complete. The doors to be 7.2 x 3.0, double moulded, $\frac{8}{4}$ thick, made in four panels; the jambs same as described for the second story; the trimmings of this story to be a 7 in. plain pilaster, $\frac{4}{4}$ thick, moulded caps, plain bars, frieze and denstaled crown mouldings. The windows to have splayed $\frac{4}{4}$ jambs, $\frac{6}{4}$ moulded edge seats, and plain aprons; one set of sliding and folding-doors made as before described, and one set of folding-doors to be made the full width of the room, allowing for strong jambs, to which the doors are to be hinged, to be made in four folds, hinged together with 3 hinges, 4 x 4, in the most substantial manner. All the doors in the back rooms to have transoms over do., 15 in. high, hung on pivots of hard wood. The mantels of this story to be made as described for the second story. The carpet-sills and hearth-borders to be of cherry; the washboards to be 11 inches wide, including the mouldings.

Fourth story.—The windows to be 12 lights, 12 x 16, made as before described; the small back windows to be 8 lights, 10 x 16. The doors to be 3 by 7, double moulded, with plain jambs, as before described; the windows to have splayed $\frac{4}{4}$ jambs, $\frac{6}{4}$ moulded seats, and plain aprons; the doors over the back rooms to have transoms, as before described. The trimming of this story to be a beaded casing, 6 in. wide, frieze and neat crown moulding. The mantels to be of wood, of a neat, plain marble pattern. The washboards to be 10 in. wide, moulded edge. The carpet-sills and hearth-borders to be of pine.

Fifth story.—The windows to be 12 light, 12 x 12, made as before described,

up through the several stories, as shown on the plan, to the fifth story, cherry hand-rail, plain ballusters, and turned newels whenever necessary, $\frac{5}{4}$ y. pine steps, $\frac{4}{4}$ risers and plain mitred string.

A dumb-waiter, to be formed of $\frac{5}{4}$ tongued and grooved boards, put up vertically, to be 3.6 x 3.6 in the clear, and to extend from the kitchen up to the fifth story of the building; the sides of the boarding next to the rooms to be stripped, and lathed and plastered, communicating doors to be made to each story, and in the fifth story the boarding to terminate 2 ft. 6 in. above the floor, and enclosed at the top with a $\frac{5}{4}$ folding battened door. The sliding frame to be made of iron with a portable wooden tray to fit on do., and worked with judiciously arranged sheaves, cords, and cranks, put up complete.

56 A neat and substantial kitchen dresser 8 feet long, the main shelf to be $2\frac{1}{2}$ feet wide, $\frac{6}{4}$ thick, of merch. white pine, and placed 2 ft. 8 in. above the floor, the space under the main shelf to be formed into two closets, with pannel doors to each; the space above to be divided by two shelves 1 foot wide. The wash-boards to be confined to the kitchens to be 6 in. wide, square edged, put up after the plastering. The doors and windows to be trimmed with a 3-inch band moulding.

First story.—The south store fronts to be made according to the plan, of the best material and workmanship; the girders to be of cast iron, and supported by cast-iron columns, as described under the head of iron work; the doors to be of two thicknesses of $\frac{6}{4}$ merch't white pine with moulded portable shutters, and provided with best quality brass screw-bolts, iron lifts and stubb-bolts 10 in. square bolts at the bottom, and spring and chain store-door bolts at the top; the sash frames to be made of $2\frac{1}{2}$ N. C., free from pitch, to be secured with $\frac{6}{4}$ moulded panel shutters as described for the doors, to be trimmed with pilasters and cornice as shown on the plan; the inside to be neatly cased with the usual bedded casings, fatias and panelled soffeits, and enclosed on the inside with $\frac{6}{4}$ sash doors, and divided into moderate size panes of glass, hinged and fastened with buttons, the usual bottom show-shelf to be put in each window. The east store front to have plain cast-iron posts and girders, with double cast store doors and shutters, put up as is usual to granite fronts; two doors on the alley communicating with the stores, to be 4.0 x 8.6 in the rabbets; frames to be of $2\frac{1}{2}$ N. C., and the doors to be made as described for the other store doors; one door to communicate with the kitchen stairs from the alley, to be 2.10 x 8.6 including the transom; the frame to be of $2\frac{1}{2}$ N. C.; the door to be in 4 panels, bead, and flush; one window, 12 light, 8 x 10, to light the space under the skylight; the frame to be solid, with sliding sash made in two flight. The floor under the skylight to stand clear of the brick wall at least 6 inches, and to be boarded up with all heart N. C. $\frac{5}{4}$ board, dressed, tongued and grooved, secured at the top by a $\frac{3}{4}$ N. C. plate grooved to receive the boarding. The skylight sash to be framed of $2\frac{1}{2}$ N. C. divided as per plan, with bars one inch thick, with channels cut in the rabbet bed, thus, , to extend from the stairway on the north to the return back wall of the front building, forming a valley at the turn with a tongued and grooved joint, well painted with white lead; the sash to decline two feet, and secured in a substantial manner at the top and bottom to prevent leaking. The walls at the skylight to be secured and supported by cast-iron girder and columns as described under the head of iron works. The wash-boards to be 7 in. wide, of $\frac{4}{4}$ selects, put up after the plastering, the trimmings to be a plain architrave. The partition dividing off the small west store

57 to be of $\frac{5}{4}$ y. pine, dressed both sides, and tongued and grooved and beaded, put after the plastering.

Second story.—The front windows to be 15 light, 12 x 20 sash, double box frames of $\frac{6}{4}$ white pine, with the usual boxings for weights and for the sliding of the sash above the frames; the back windows to be 12 light, 12 x 20, double box; the windows to have $\frac{5}{4}$ mortise blinds complete, to be trimmed with splayed

jambs, opened face $\frac{6}{4}$ pilasters, 8 in. wide, with moulded caps, plain bars, frieze and cornice, with broken bed moulds; the dining-room windows to have $\frac{6}{4}$ seats and open aprons; three sets of sliding doors, made and arranged with two divisions to slide and two swing on hinges, to be made as broad as the width of the room will allow, and of the same height as the windows; the doors to be $\frac{5}{4}$ thick, each fold divided into four panels, double moulded with handsome Grecian mouldings, the trimmings to be same as described for the windows. The other doors to average 7.4 x 3.2, made in four panels, $\frac{8}{4}$ thick, double moulded and trimmed as before described; the jambs to be $\frac{8}{4}$ white pine in the stud partitions, and opened in the brick partitions. The front entrance to be a recessed doorway, finished in the same style as that of Mr. Lawrence's, on E street. The inside steps at the front entrance to be of best N. C., free from pitch, $1\frac{1}{2}$ thick rise, of $\frac{5}{4}$ yellow pine, to extend across the passage, and so arranged as to project as little as possible below the store ceiling. A handsome staircase, as per plan, to commence on this floor and to continue up to the fifth story, the steps and risers to be of the best quality $\frac{5}{4}$ N. C.; open scroll brackets, ornamented fatias; oval mahogany hand-rail; turned and moulded oak ballusters; moulded open-faced skirting, and the walls around the windows studed out with $\frac{3}{4}$ studs to a cornicinedar form; the spand-rail to be single moulded, panelled, and a closet formed under the first flight of steps, and the windows to have a sash-door to do., 6.10 x 2.10, with a tramer over do., as large as can be used to look well. The closets at the end of the dining-room to have panel doors, $\frac{6}{4}$, single moulded, and made in folds, to be shelved in the usual way, arranged from 16 in. to 12 in. apart, starting from the bottom shelf, $\frac{6}{4}$ thick and 18 in. wide, placed 3 feet above the floor. A suitable hinged sash to be put each closet, secured by a gauze wire covering. All the mantels required in this story besides the marble ones specified, to be of a neat marble pattern, made of clear, well seasoned white pine. The washboards to be 12 inches wide, including the moulding, opened on the top edge two inches, and the moulding two inches, and put up to grounds. The carpet-sills and hearth-borders to be of mahogany, of the usual width. Three windows to Miss Dermott's rooms, to have inside shutters in five folds, cut in three pieces; the wall to be studded to suit do.

Third story.—The windows to be 12 x 18, double box, 12 light, except
58 those in the small rooms over the dining-room, which are to be 8 light, 10 x 18, made as before described, with blinds complete. The doors to be 7.2 x 3.0, double moulded, $\frac{8}{4}$ thick, made in four panels; the jambs same as described for the second story; the trimmings of this story to be a 7 in. plain pilaster, $\frac{4}{4}$ thick, moulded caps, plain bars, frieze and denstaled crown mouldings. The windows to have splayed $\frac{4}{4}$ jambs, $\frac{6}{4}$ moulded edge seats, and plain aprons; one set of sliding and folding-doors made as before described, and one set of folding-doors to be made the full width of the room, allowing for strong jambs, to which the doors are to be hinged, to be made in four folds, hinged together with 3 hinges, 4 x 4, in the most substantial manner. All the doors in the back rooms to have transoms over do., 15 in. high, hung on pivots of hard wood. The mantels of this story to be made as described for the second story. The carpet-sills and hearth-borders to be of cherry; the washboards to be 11 inches wide, including the mouldings.

Fourth story.—The windows to be 12 lights, 12 x 16, made as before described; the small back windows to be 8 lights, 10 x 16. The doors to be 3 by 7, double moulded, with plain jambs, as before described; the windows to have splayed $\frac{4}{4}$ jambs, $\frac{6}{4}$ moulded seats, and plain aprons; the doors over the back rooms to have transoms, as before described. The trimming of this story to be a beaded casing, 6 in. wide, frieze and neat crown moulding. The mantels to be of wood, of a neat, plain marble pattern. The washboards to be 10 in. wide, moulded edge. The carpet-sills and hearth-borders to be of pine.

Fifth story.—The windows to be 12 light, 12 x 12, made as before described,

the small windows on the back to be 8 light, 10 x 12; the doors to be same as described for the fourth story; the washboards the same as fourth story; carpet-sills and hearth-borders of pine. A reservoir to be made of $\frac{8}{4}$ white pine 8 feet wide, 4.6 wide, and 3 feet deep, to be elevated up to the ceiling, to be secured by stanchuns and flooring joist, with the usual strap and iron bolts at the angles and through the centres.

Warehouse.

The cellar doors in the front to be 4.0 x 6.8 frames, made of $2\frac{1}{2}$ N. C., the doors $\frac{5}{4}$ N. C., dressed, tongued and grooved and beaded, hinged with two fort straps and stock-locks with brass works. Two solid windows, 12 lights, 10 x 12; two do. in the back 3.4 x 3.6, with $\frac{7}{8}$ round iron bars 6 in. from centres, the sash to do. to be made in two folds, and hinged with slip-butts and fastened with 4 in. tow-bolts. One flight of strong rough steps of $\frac{8}{4}$ y. pine to communicate with the store above.

First story.—The store front to be of cast-iron, as described for the east store front, to the corner store, with sash doors made in the same manner.
59 One door on the alley and one on the back, 4.6 x 9.0 ft., made same as the other store doors, the frames to be of $2\frac{1}{2}$ N. C., with the customary fastenings for store doors. Three windows, double box frames, 12 lights, 12 x 16 sash, with shutters, made, hinged, and fastened as described for the basement stores. A strong rough stairs to extend up to the fourth story; the steps to be of $\frac{6}{4}$ N. C., with $\frac{4}{4}$ risers, dressed, and to run up in straight flights to each story; the first story steps to be 4 feet long, the second 3 ft. 3 long, and the third 3 ft. long, to have square newels and pine rails; the first flight to be boarded up underneath, with a buttoned door in do. leading to the cellar; two trap-doors to be formed in each of the floors framed, 5.0 x 5.0, with double joist trimmers; the doors to be framed of the flooring and hinged with strong T hinges. Corresponding well holes for stairs to be framed in each story south of the range of columns, and to be floored over; in case the warehouse should hereafter be divided into two stores, the well holes would be made for the stairs.

Second story.—The three windows in the front to correspond with the windows in the corner house, but no inside jambs or trimmings. Five windows, 12 lights, 12 x 16 sash, double box frames, but no inside finish; to have shutters same as first story. Every third joist of this floor to be long enough to pass through the south wall, to form a galley floor to extend from the corner house to the second story of gentlemen's water-closet, to be framed into a joist at the ends, so as to leave the floor 2 ft. 10 in. clear of the blinds. Two rows of 5 x 4 N. C. scantling to be let into the joist to nail the floor to, which is to be of all heart N. C. $\frac{5}{4}$ thick joists, painted with a white lead, and the same description of galley floor to extend along the front of the closets, so that each may be entered from the galley. The entire length of the galley to be protected by slat-work left high; the frame to be made of $2\frac{1}{2}$ N. C., consisting of posts $2\frac{1}{2}$ x 4 in., placed 4 or $4\frac{1}{2}$ feet apart, as may be found most convenient, on the top of which to be framed $2\frac{1}{2}$ x 4 in., and a bottom rail 6 in. from the floor, 9 in. wide, of $2\frac{1}{2}$ N. C., the spaces to be filled in with slats $\frac{7}{8}$ thick edges, rounded and cut into the posts; the top of each part to have a stay by $2\frac{1}{2}$ x $4\frac{1}{2}$ N. C. strips let into the brick wall and wedged tight.

Third story.—The three front windows to correspond with those in the corner house, except no inside finish; five back windows, 12 lights, 12 x 18 sash, double box, without shutters, blinds, or inside finish.

Fourth story.—The three front windows to correspond with those in the corner house, except no inside finish; five back windows, 12 lights, 12 x 16 sash, double box, without blinds, or inside finish. The passage to the ladies' closets to be of $\frac{5}{4}$ N. C., dressed, tongued and grooved, and beaded; four closets divided

off as per plan, with $\frac{5}{4}$ boards dressed both sides, and tongued and grooved,
60 and a slop closet; each to have a panel door 6.6 x 2.4, hinged with $2\frac{1}{2}$ butts, and fastened with a tour bolt 5 in. long; the seats of the closet to be made in the best manner, fitted to the plumber's work in a neat and substantial manner; the closets to be fitted with skirting and every other finish necessary for plastered walls; each closet to have a window of 3 lights of 10 x 12 glass, the frames to be of $\frac{8}{4}$ white pine, with 3-in. N. C. sills; a door to the passage to correspond with the fourth story doors in the corner house; the small windows to the water-closets to have stationary blinds.

Fifth story.—Extends westward as far as the west line of the corner house; the centre passage from the corner house to be extended through the warehouse and the space divided into four rooms, with 6 windows of the same size and finish as there is in the corner house; the washboards the same; the door to each room same as described for the corner house.

Miscellanies.

The tin roof over the warehouse to be covered with rough $\frac{5}{4}$ N. C. boards, put 2 in. apart and nailed to $1\frac{1}{2}$ x 3 in. N. C. strips placed 2 feet apart; fifteen posts, 5 x 5, dressed, and *cornice* of N. C., to be firmly fastened to the roof for clothes-posts, each to have a round pin put through the post to fasten the line to, the posts to be 7 feet out of the roof; a platform to extend from the back door in the fifth story to the roof over the back part of the warehouse, to be made in a most substantial manner of N. C. joist and flooring, to be secured by strong rails and newels; the door which communicates with the platform to be 4 feet wide, made in two folds and same height as the other doors, the frame to be made of $2\frac{1}{2}$ N. C. revealed, rabbeted, and beaded; the sills be of 4-inch North Carolina.

The roof over the front of the warehouse and the return west end of the corner house to be sustained at the crown by a trussed gallows framing, starting from the raising floor of joists and up high enough to rest the top of the rafters on the top plate of the gallows; the top and bottom plates to be 3 x 12, and the posts and braces to be 3 x 8, all of N. C., framed and strapped in a substantial manner; the front balcony extending from the west line of the building across the south front and along the east front, so as to enclose the window next to the main entrance to be 3 ft. 6 in. wide, making as near as may be $98\frac{1}{2}$ ft. lineal of balcony floor, and $112\frac{1}{2}$ feet lineal of iron railing to do.; the flooring to be all heart $\frac{5}{4}$ N. C., laid in beaded joints on 3 x 4 all heart N. C. rails, of 3 ranges, supported by plain wrought-iron beams, 19 in all, including the angular one, to be $2\frac{1}{4}$ x 1 in., and to run through the wall and fasten firmly to the joists on the inside; the under side of the floor to be neatly ceiled with $\frac{4}{4}$ white pine, dressed,
tongued and grooved, and beaded; snow-finders to be put to all the eves
61 where the roof is slated; those on the front to be 7 in. wide, and the back 5 in. wide, of $\frac{8}{4}$ white pine, sustained by the usual wrought-irons; corner beads to be put to all exposed plastered corners; all the joists of the warehouse exposed to view to have the lower edge faced and the sharp corner taken off.

Privies in the back yard, both stories, divided by $\frac{5}{4}$ dressed, tongued and grooved board partitions; the seats and risers to be of $\frac{6}{4}$ white pine; those in the second story to have margin casings and hinged flaps; skirting to be put to such walls as are to be plastered; the soil-pipe, being brought down in the corner of the south end, is to be covered by dressed casings; the floors to be of all heart N. C. $\frac{5}{4}$ mill dressed, laid on N. C. joists $2\frac{1}{2}$ x 8; the partitions in the second story will be one foot short of the ceiling and capped; a window of 8 light 9 x 12 glass to be put into the south division, second story, made in two flights to slide in the usual way, and a stationary blind on the outside; the doors to be 2.4 x 6.8, $\frac{6}{4}$ thick, made with bottom panels, the space above the bottom panels to be mortised slats, and hinged and fastened in the usual

way; the boxes for the privies to be made of $\frac{6}{4}$ merchant white pine, free from splits or sap, dressed on the inside, and on the front to form the riser; to be dovetailed at the angles and put together at the joints with white lead; to be two feet wide on the outside, two feet deep, and in length equal to the dimension of the divisions; these boxes are to be set upon brickwork laid in cement, equal in breadth to the width of the *boes*, and so graded as that, by having two courses of brick above the floor on each side, the top of the seats may not be more than 18 inches above the flooring; the brick floor under the boxes is to be formed with a curve or dish grouted with cement, and made to decline to the south and discharge itself into the drain before described; the box which receives the discharges from the soil-pipe to have the top edge of the *ceir* curved out so as to allow the water to run off into the drain below, 4 inches under the seat; the roof to be $\frac{8}{4}$ culls, 6 in. at the eave and 15 in. at the top, placed two feet apart, close sheathed for tin.

The 1st story door frames to be made of $\frac{8}{4}$ white pine, with granite sills and $\frac{4}{4}$ battened doors, each door to have a 4-in. dead lock in the south division, first story, to have a 4-light window 9 x 12, with blinds on the outside and the sash hinged in the inside; the doors and windows of both stories to be trimmed with a 3-inch band-moulding, put up after the plastering; the seats of the first story to be made portable, so that the boxes can be cleaned out from the inside; five gates to be made for the alley fence wall, to be 3.4 in. in the clear and 7 feet high; the frames to be made of $2\frac{1}{2}$ N. C., to rest at the bottom on N. Y. stone blocks worked into the wall and secured by iron dowels and wall irons; the two inner jambs of the gate to be separated by an 18-inch pier, to which they are to be confined by two $\frac{3}{4}$-in. bolts and nuts; the gates to be 62 made of $\frac{5}{4}$ N. C. dressed, &c., with two battens and braces, hinged with 22-in. straps, with hooks made with plates and screwed to the jambs; one of the doors to have a stock lock with brass works; the other door leading to the privies to have a spring lock, constructed as to bolt itself when closed, and opened only by the keys of the privies.

The fence dividing the yard of the warehouse from the privies to be 6 feet high, boarded with good $\frac{4}{4}$ culls, tongued and grooved; the posts to be sawed to 3 x 5 inch, rough-beaded fatia, and bare board to be put on each side of the boarding with wrought nails, the heads to be let into the posts. A cap to be put to fence of $\frac{8}{4}$ culls, jointed edges and bevelled top.

A girder of N. C., 5.6, dressed, to be put under the second and third floors of joists in the warehouse, on top of the iron columns, and to extend from the front to the rear of the building. The three doors to outside vaults to be of $\frac{5}{4}$ N. C., battened, dressed, tongued, and grooved, &c., hung with strap-hinges, and a good 6-inch stock lock, with brass works, to each door. The frames to be of N. C., $2\frac{1}{2}$ x 7 inch, made 2.8 x 5.9 in the clear. The doors from the kitchen into the vault under the alley to be 2.8 x 5.10 square, worked $\frac{6}{4}$ thick, hinged and locked as before described; the jambs to be of $\frac{5}{4}$ white pine. The door inside of the vault leading into the cellar to be a battened door, with frame, hinges, and lock complete.

A skylight to be constructed over the main stair-case, according to the plan, to be framed with double outside rafters and 4 x 6 N. C. trimmers. The space from the rafters to the ceiling to be splayed upon each side and plastered. The sash to be made as described for the other skylights; the two ends to be made of perpendicular sash. Seven closets to be put up in the recesses of the chimneys, in the usual way, with doors to correspond with them in the rooms.

Plastering.—The fifth story of the warehouse, the passage to and the ladies' water-closets, the entire corner building, except the basement stories, the ceiling over the alley, and the gentlemen's water-closets, to be plastered in the best manner, in three coats, hard finish. The second and third stories to be set with calcined plaster, the balance finished with lime and fine white sand; woo

beads to have quirks cut to do. The plastering to the privies to be floated up with the white coat and sand to give them a rough, hard surface. The mortar to be composed of well-slacked and strained wood-burnt Potomac lime, sharp sand, and hair in just proportions, warranted not to blister. The laths to be best quality, nailed on sufficiently far apart to insure a good key.

Painting and glazing.—The store fronts and the second and third story doors to be painted in the best manner in oil, imitation of oak or maple.

63 All the blinds to be painted 3 coats verdigris green. All the woodwork usual to be painted. Both outside and inside to have 3 coats plain colors. The moulded washboards to be painted in two colors. All the wood mantels to be painted black and varnished. All the iron railings and gratings to be painted two coats black. The oak ballusters and hand-railing to be varnished three coats. The gallery and balcony floor to be oiled two coats. The brick cornice and frieze to the south and east fronts to be painted four coats plain white.

The glass for all the store fronts (except the inside glass to the show windows) and skylights to be double thick, best quality cylinder glass. All the other glass to be No. 1 cylinder, free from stains, clouds, and blisters; to be glazed in the best manner, and the front sashes to be traced with black. The iron-work to the store fronts and the iron columns to be painted of such colors as Miss Dermott may select.

Slating.—Foundation slate to be in all the walls whenever necessary, to prevent the damp affecting the plaster.

All the roof, except that portion described to be tin, to be covered in the best manner with best Susquehanna gauged slate, put on with copper nails.

All the flashings to the chimneys, valley gutters in the roof and behind the chimneys, flashings around each of the skylights, and the gutter on the south side of the skylight, over stairway, to be made of copper and put on in the most effectual manner.

In witness that the within specifications constitute the schedule (A) referred to in our articles of agreement of this date, we hereto subscribe our names this 22d April, A. D. 1857.

ZEPHANIAH JONES.
ANN R. DERMOTT.

Witness: WALTER JONES.
JOHN C. HARKNESS.

Writ of error produced.

And whereas, afterwards, to wit, on the thirtieth day November, in the year eighteen hundred and fifty-seven, the said defendant, by her attorney aforesaid, produced and filed in court here the United States writ for the correcting of errors of and upon the judgment aforesaid, directed to the judges of the circuit court of the District of Columbia for the county of Washington; and in pursuance thereof, and according to the form and effect of the law in such case made and provided, a transcript of the record of proceedings of the judgment aforesaid, and all things thereunto relating, with the writ of error aforesaid, and a copy of the appeal bond hereunto annexed, is hereby transmitted to the said Supreme Court accordingly.

64 *Clerk's cert. and seal.*

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this 17th day of February, 1858.

[L. S.]

JNO. A. SMITH, *Clk.*

Filed 26th February, 1858.

SUPREME COURT OF THE UNITED STATES,

December Term, 1863.

INGLE, ADMR. OF ANNE R. DERMOTT,

vs.

ZEPHANIAH JONES.

BRIEF OF COUNSEL FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS AND POINTS OF LAW.

By the agreement of counsel, to be found on page 42 of Record, the present Record is to be considered as incorporating the Record of the former writ of error in this Court, the decision on which is reported in

23 Howard, p. 220.

These two records constituting in fact, but one record, we will refer to them as Record Nos. 1 and 2.

This suit was brought on the law side of the Circuit Court of the District of Columbia, on the 13 July, 1852, in a plea of debt.

Record No. 1, p. 3.

At March term, 1854, on motion of the Defendant, the Court ordered that the Plaintiff elect, during that term of the Court, between the said suit at law and the said bill in Chancery, and dismiss either the said suit at common law or so much of the bill in Chancery as goes for the $5000, and interest thereon claimed, as payable by the terms of the contract under seal, exhibited with said bill on the 1st Oct. 1851.

Record No. 1, p. 5.

At the date of this order, by some omission, the Plaintiff had not filed his narr, but filed it in debt, on 25 January, 1856,

counting on a debt of $5000, for work, and labor, and materials, furnished in the erection of certain buildings, and finishing and completing certain stores in said buildings, with the addition of the money counts, and superadding at the instance of Defendant, a bill of particulars for $12,225.65.

Record No. 1, p. 6—7.

After the filing of this narr the Defendant, at March term 1856, submitted her motion for a second rule to elect between said suits at law and in equity, and in answer to said second rule, the Defendant "elected to recover in this action, only the $5000 mentioned in his said Bill in equity, to be paid by Defendant on the completion of the stores and warehouse, in said Bill mentioned and claimed, on the 1st October, 1851, with interest, and disclaims all right in this cause to recover any portion of said $14,000," (meaning the $14,000 claimed under the contract stated in said Bill.)

Whereupon the Court ordered that "the Plaintiff having made his election to prosecute this action of debt for the recovery of the said sum of $5000, it is further ordered by the Court that the said Bill in Chancery be and the same is dismissed accordingly, quoad the said $5000."

Record No. 1, p. 9 and 10.

After the Defendant had filed four pleas to the narr, the Plaintiff on the 30 June 1856, with leave of the Court filed an amended narr.

Record No. 1, p. 15 and 22.

It is not necessary to notice the amended narr further than to state that in the first and second counts, it sets forth the special sealed contract between the parties, dated 22 April, 1851, for the erection of a certain building, and counts on the non-payment of the $5000, payable by said contract on the 1 Oct. 1851, upon the completion of the stores and warehouse, part of said building and in addition to the claim for this $5000, it adds a fourth count claiming $ 0,000, and files as part of said count the bill of particulars, showing that the said fourth count is only for "extra work beyond the contract," on said stores and warehouse, amounting to $4,136.23.

Record No. 1, p. 19 and 22.

After various pleadings, demurrers and motions, not necessary to be noticed, and just before the jury were empannelled, the Defendant moved the Court "to require the Plaintiff to elect between a recovery on the bill of particulars filed in this cause, &c. and a recovery on the same causes of action under the bill in equity," &c. And the Court having required such election, "the

Plaintiff elected to prosecute his said demand for extra work, viz. $1136.23, in this suit."

Record No. 1 p. 30—31.

There being a verdict and judgment for said $5000 and said extra work $1136.23, the case came to this Court on writ of error, and was reversed, because by the special sealed contract which constituted the cause of action, quoad the $5000, the completion of the stores and warehouse on or before the 1 October 1851, was a condition precedent not performed by the Plaintiff.

Dermott *vs.* Jones, 23 Howard, 230—1, 2

Finding that there could be no recovery at law for said $5000 under said special contract, and that all the attempts made to show an extension of time by the Defendant for the completion of said stores and warehouse had signally failed by the ruling of this Court, the Plaintiff, nothing daunted by this decision, or by his recorded election to prosecute for the $14,000, (the residue of the contract price stipulated to be paid on the completion of the entire building) conceived the bold design under the mandate of this Court, of repudiating his original cause of action as founded on the special sealed contract, and at the same time of ignoring his election to prosecute for the major part of his said claim in a Court of Equity.

The mode of accomplishing these happy results was as simple as it was thought to be efficacious. It was by a brilliant "*coup de main*" in January, 1860, when the Plaintiff filed the mandate in the Court below, and obtaining general leave to amend his narr, at once filed a new narr in debt, counting in each count a simple indebtedness to the amount of $25,000, and claiming $40,000 for damages."

Record No. 2, p. 4 and 5.

Having thus cleared away the embarrassments of his original pleadings and election by the decree of a new narr, he filed in May following, a Bill of particulars, headed "Estimate of work and materials furnished in the erection of The Avenue House and the warehouse attached, situated on the land commencing on Market Space and 7th Street West, &c., made from actual measurements and surveys, to wit:"

Record No. 2, p. 5—15.

This Bill of particulars being part of the declaration, and intended to give certainty to its general claims in the several counts, each of which is based on an indebtedness of $25,000, only goes beyond the legal limits of these counts, and swells the claim of the Plaintiff to the modest sum of only $39,864.28 covering only ten printed pages of this Record in its details of work now claimed to be paid for by an estimate based on measurement.

The verdict and judgment rendered on this amended narr was for $22,149, with interest on $20,136 from 5th April, 1852, to date of verdict, (October, 1861.)

Record No. 2, pages 17 and 18.

The amount of the verdict, therefore, even computing the interest to April, 1861, 9 years only, is for $33,022.44, an amount exceeding the $25,000 claimed in each count by some $8,000.

It will be observed that in this amended narr no sum whatever is demanded as the debt.

4 Wendell, 393.

DEFENDANTS' FIRST EXCEPTION.—In page 23 of Record No. 2 will be found our 1st Exception to the refusal of the Court, before the jury were sworn, to grant our motion made on the 8th day of May, 1860, to strike out the amended narr and Bill of particulars, and requiring the Defendant to plead by 10 o'clock next day.

This exception is awkwardly expressed, but it appears that the Court overruled our motion to strike out on the 14th November, 1861, and "at same time" required us to plead by next day, all of which we excepted to on same day.

We shall insist that the Court erred in refusing that motion, because the Plaintiff was estopped by his previous election from claiming in this action anything but the $5,000 and the Bill of $1,136.23 for extra work; and it was an abuse of the leave granted to amend the narr, which the Court should have corrected on our motion.

We will moreover insist, that such a flagrant and palpable abuse of the general leave to amend can be reviewed and remedied in this Court, even if we had not distinctly excepted to the refusal of the Court below to correct it.

DEFENDANT'S SECOND EXCEPTION.—Record No. 2, p. 24.—After the jury were sworn, the Defendant again sought to hold the Plaintiff to the election made by him in the previous stage of the cause, and for that purpose, after he had examined John C. Harkness to prove the measurement and valuation of the work done on the entire building, including stores, warehouse and hotel, and when the Plaintiff offered to prove by said witness the measurement and valuation of all said work, that is, as specified and described in said amended Bill of particulars, (the one amounting to $39,864.28,) we objected and relied on the Plaintiff's Bill in Equity, the answer thereto and the Exhibits filed, which are to be found in

Record No. 2, pages 42 to 54.

This bill of the Plaintiff shows that it was founded on a sealed contract and specifications for the erection of the Avenue House, which were filed therewith as Exhibits Nos. 1 and 2.

These exhibits are not copied in Record No. 2, because they are set forth in

Record No. 1 p. 43 to 63.

And are the same articles produced by Plaintiff upon the oyer craved by Defendant.

Record No. 1, page 25.

We thus see that our second exception was founded on the production of the Equity Record and the sealed contract, which constituted the common cause of action, on which it and this action at law were originally founded, and in respect to which the Plaintiff had solemnly elected to prosecute the suit at law, only for the $5,000 payable on 1st October, 1851, and to claim the residue of the contract price (14,000) only in the equity suit, which was then and still is pending — See Appendix to Final Brief.

The point of our second exception is the refusal of the Court to enforce the election made by the Plaintiff, by allowing him to claim on measurement and valuation for the entire work done on the same buildings, amounting as claimed to $39,864.28, instead of the $5,000 which he had confined his suit at law to, by the election made at March term, 1856.

Record No. 1, p. 9 and 10.

In considering these several exceptions, relative to the legal effect of the election made, we will maintain that such election made in the progress of a cause and ~~intend~~ of record, is conclusive, as an estoppel upon all subsequent efforts of the party to escape its force and effect.

1 Saunders' Plead. and Ev. 61.

1 Greenleaf Ev. § 27, 186.

1 Smith's Ch. Pract. 561—563, and

1 Waterman's Eden on Inj p. 57—58 and notes.

If this be an estoppel, then the Court erred in allowing the Defendant in error, in utter disregard of that election, to ignore the special contract, and claim by his amended narr, Bill of Particulars and evidence, as upon a *quantum meruit*, the entire consideration alleged to be due him for doing the very same work which he had sued for under the sealed contract to recover, under which he had elected to claim in this action only the $5,000, payable on the 1st October, 1851, and the $1,136.23½ for extra work.

The motive of the Plaintiff in thus overleaping the special contract, and his admission by election on the Record, plainly appears, when we look at the decision of this Court on the first writ

of error taken in this cause, when it was ruled that the completion of the stores and warehouse on the 1st of October, 1851, was a condition precedent to the right of the Plaintiff to recover.

23 Howard R. 231.

Under the mandate of this Court, the Plaintiff should have been non-suited, unless he could introduce new evidence to show a waiver by Defendant of the time of completing those stores and warehouse, which might imply an assumpsit, but could not be relied on in debt.

19 How. 239, Slater *vs.* Emerson.

5 G. & J. p. 239.

But by the rulings of the Circuit Court, the Plaintiff is benefitted under this mandate, by being absolved from all the conditions of his sealed contract, and all the obligations of his recorded election.

The third exception involves the point, whether after the Plaintiff's witness has stated that the work was begun under a written contract between the parties, the Plaintiff could proceed with further proof without producing the contract, or accounting for its absence.

Record No. 2, p. 24—5.

We submit that the ruling thus excepted to was a departure from the rules of evidence, and in such a case the written contract must be produced, even on a claim for extra work.

1 Greenleaf Ev. § 87.

1 Esp. R. 127.

1 M. & M. 257.

12 M. & W. 425.

2 Smith's Leading Cases, p. 41.

The fourth exception involves the same rule of evidence as the third exception, and the Plaintiff having rested his case, the Defendant had a right to begin his by the cross-examination of Plaintiff's witness, and as part of that cross examination, to enquire whether the work, (about which he had testified in chief,) was not begun under the written contract produced to the witness.

In refusing this enquiry the Court further erred.

Record No. 2, p. 25.

The fifth exception is a more unmitigated violation of the right of cross-examination.

Record No. 2, 25—6.

The sixth exception begins at page 26, and terminates at page 31 of Record No. 2.

It details the evidence of Harkness to prove that the sinking of the building and the consequent damage done to its walls, &c.,

was caused by the fact that it was erected on an apparently solid clay substratum of earth, and that the addition of two chimneys on the building, not called for in the specification, caused such an increase of weight in this five story building as to break through the crust of yellow clay at its foundation, and bring a portion of the walls down into soft blue mud, by a process which he calls "a settlement of $8\frac{1}{4}$ inches," and also to prove by same witness that "he considered the building fit for use and habitable when the Plaintiff gave it up to Miss Dermott, although the front wall on 7th Street had cracked, and the south wall of warehouse had settled as aforesaid.

The Defendant then proved by Colley, Wantz, King, the depositions of Mr. Neirnsee and Andrews copied in pages 54 to 70, and by other witnesses, the dilapidated and dangerous condition of the building, and the repeated sinking of its walls in the soft mud on which it was being built by the Plaintiff—that the Plaintiff told the witness, Christopher Andrews (p. 63) that he had not examined the foundation on which he was about to repair the first break and rebuild the wall, "but it should be all right before he was done with it;" that the witness Harbaugh (p. 30) told the Plaintiff if he built again on the same foundation, he would have to build again, "as he was on blue mud 8 or 10 feet thick."

And by Colley (p. 27—8) that the crust of yellow clay on which the Plaintiff had built this immense structure, was in places only six inches thick, which could have been detected by using a crowbar in the excavations before building.

Also by numerous witnesses whose evidence is detailed in this exception, and especially by Neirnsee and Andrews, (pages 54 to 70,) by Colly, (p. 28,) King, (p. 29,) Wantz, (p. 29) Ross and Hanover, (p. 30,) that another cause of the dilapidation of the building was to be found in the defective and unskillful workmanship of the Plaintiff and his servants, and especially in the want of sufficient drainage of water descending through the spouts and otherwise passing in and about the foundations.

The Defendant also proved by said Harkness, (p. 29) that "he and General Jones were the subscribing witnesses to the sealed contract, with the specifications made a part thereof, and that the drawings accompanying said contract were placed in the hands of the Plaintiff, and said building was begun according to the plan of said specifications and drawing, and was executed according to the same, modified by Miss Dermott," and it was agreed that said contract might be read from the printed Record in Supreme Court, being

Record No. 1, at p. 43 to the end.

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Record No. 1, at p. 43 to the end.

See Contract copied in Appendix to this Brief.

By this contract it will be seen that the Plaintiff not only contracted to erect this building according to the plans and specifications, but "to supply and procure every material, implements, fixtures, matters and things requisite and proper for the execution of said work, in all its parts and details, and for the complete finishing and fitting for use and occupation of all the houses and buildings, and the several apartments, &c. pursuant to the plans described in the written specifications."

We have detailed this evidence thus fully, because of its bearing upon the material points involved in the prayers granted and refused, but the precise point of this sixth Exception involves the admissibility of the evidence offered by the Plaintiff and received by the Court as shown in

Record No. 2, p. 31.

The witness Walker having in that page testified that three alterations from the plan of the specifications were made by Plaintiff at the instance of Miss Dermott, but he had no knowledge of Miss Dermott telling the Plaintiffs that these alterations must be made, if the work was thereby delayed beyond the stipulated time for its completion, except on one occasion when the iron girder was about being substituted, "she then told the Plaintiff that it must be done if it delayed the work beyond the stipulated time, and she would not take advantage of said delay"— And the Plaintiff then offered to prove by said Walker, that after the work was begun, he became a partner with the Plaintiff, but said copartnership, by verbal agreement, related to the inception of the work, that Miss Dermott knew said Walker was such partner, and frequently told him that the other alterations (meaning those specified by him, in same page, other than the substitution of the iron girder) must be done if they delayed the work, and she would take no advantage, &c. and that the witness had before this suit, sold out all his interest to the Plaintiff.

We contend that this evidence, as excepted to, should have been rejected, because, if it made Walker a partner, quoad the Defendant, then before he assented to make the required alterations, he should have expressly stipulated for a sufficient extension of the contract-time, and not left it, as he says, contingent, "if it caused delay," &c.

And if the evidence did not constitute him a partner quoad the Defendant, then the proof offered was clearly inadmissible, because the witness was but a servant of the Plaintiff, and the declarations made to him by Miss Dermott were irrelevant, unless communicated to the Plaintiff and acted on by him.

The Defendant's seventh exception, at page 31, incorporates all the preceding evidence, and the Plaintiff's rebutting evidence, which will be found from page 37 to 42.

As this is but rebutting evidence, we do not deem it necessary to review it, but proceed directly to the consideration of the prayers granted and refused, as presented on this exception.

The Defendant's first prayer affirms the principle that if the work was done under the sealed contract, except in the particulars of the extra work claimed, then the jury are to allow the Plaintiff the contract price so far as his work, &c. can be traced to be done under said special contract, and for the alterations and extra work a *quantum meruit* price.

Record No. 2, p. 32.

The Court refused to grant this prayer without the qualification annexed in page 33.

This qualification instructs the jury that the contract price for work done pursuant to the contract, was not conclusive on the jury, should they be of opinion that certain portions of said work were done at an increased cost to the Defendant at a later period of the year, provided such later period was brought about by delays, caused solely by Defendant's testatrix, and at her request, and such increased costs may be added by the jury to the contract price.

This instruction was erroneous, because it does not require the jury to find an agreement for extension of time, but only, if the effect of the alterations required by Miss Dermott was to delay the work and increase the cost, then that she is liable for the increased cost, nor can it be sustained by arguing that the evidence tended to prove an agreement to extend the time, as the instruction ignores the agreement, but we deny that the evidence tended to prove such an agreement.

We hold the principle of law to be, that the effect of an alteration made by the builder at the request of the owner, in the absence of stipulations, for the increased cost of the alteration, or for an extension of time beyond the contract limit, is to leave on the builder all the obligations of the contract as to price and time in full force.

The presumption is that as he voluntarily consented to alterations, without exacting new stipulations, he consented to do the substituted work in the contract time, and for the contract price.

The same evidence of these alterations, and the increased work and delays caused by them, was introduced on the former trial of this cause as an excuse on the part of the Plaintiff for not completing the warehouse and three stores within the contract time.

Record No. 1, 1st Exception, p. 31.

Yet such evidence was expressly ruled by this Court as insufficient to excuse the plaintiff for his omission to complete his work in the time stipulated, and we consider the principle of that ruling to be the same as that involved in a reversal of the qualification attached to the first prayer.

23 Howard, p. 220.

The rule of law is, that the original contract remains in full force in all particulars, except where it is modified by the parties, and then it is only varied *pro tanto*, and if extra work is agreed to be done, the presumption is, that it is to be done in the stipulated time.

44 Law Lib. note to Powell and Cutter in Smith's leading cases.

5 G. & J. 263.

1 Parsons on Contracts, 541, 542.

2 Greenleaf Ev. § 235 and notes.

13 Md. 329 and 330.

The Defendant's second prayer (p. 33) claims that the jury may allow a recoupement of the $10,100 proved by Mr. Neirnsee to have been paid by Miss Dermott to render her building fit for use and occupation.

See Record No. 2, p. 61.

And the Defendant's eighth prayer (p 33) is based on the same principle, while claiming a recoupement of other damages occasioned by the Plaintiff's misconduct.

Both these prayers ought to have been granted, as there is nothing objectionable in either; they were practically refused by the Court, granting them with what they call "a qualification," but which is the very *substratum* of all the pretensions of the Plaintiff to impose on Miss Dermott, under this sealed contract, an incomplete, worthless and ruinous edifice, amounting to a public nuisance, as it was confessedly when abandoned by the Plaintiff.

This qualification (p. 34) sets aside the 2d and 8th prayers of Defendant, if the jury find "that the defects in the building at the time it was so surrendered were exclusively from the foundation thereof," and informs the jury that in that case the Defendant can recoup no damages.

The Court having thus rejected our claim for damages, because of a supposed defect in the foundation on which said building was erected, was equally bound to reject the Defendants sixth prayer, (p. 35—6,) which sought to defeat the Plaintiff's pretensions that he was excused under his contract from its non-performance,

because of the insufficiency of the substratum of earth in its natural condition to support the buildings which were placed on it by the Plaintiff as builder.

This theory makes the proprietor of the ground an insurer to the builder of the stability and solidity of the soil on which he contracts to build.

We should deny the soundness of such a doctrine in any case of a contract to build a house as a condition precedent to the payment of the price, because a man cannot be said to build a house which falls down before he completes it.

But whatever might be the general rule, we rely confidently upon the stipulation in our contract that this Plaintiff will furnish every material and thing requisite to complete and finish these buildings fit for use and occupation. He does not merely contract (as contended on the other side with the sanction of the Circuit Court) to execute these specifications, but he superadds the guarantee for which we contend, that he will, over and above the specifications, furnish every thing necessary to complete it fit for use and occupation.

He then becomes an insurer to Miss Dermott, and his performance of that contract of guarantee formed the consideration or condition precedent on which she stipulated to pay him $24,000 for his faithful performance of his whole contract, she advancing him as shown $5,000 before he commenced his work.

That in a case like this, the builder must make his contract good and deliver the building fit for use, is fully supported by the following authorities;

22 Pick. 381.
1 Campbell. 38.
7 East. 481.
1 Car. & Payne, 352.
14 Mass. 282.
2 Parsons Con. 188.
2 " " 184, note Z. and X. and 186.
6 D. & E. 650 and 750.
Story's Cont. § 973.
Chit. on Cont. 59 and 734.
" " 566 and notes.
1 Litt. 181.
3 Campbell, 451.
19 Pick. 275.
10 East. 530.
Addison's Rep. 342.

Tompkins *vs.* Dudley, 11 E. P. Smith's (N. Y.) Rep. referred to in Am. Law Register for November, 1863, page 56, decid

that where the builder has substantially performed his contract, but has not completely finished the house when it is destroyed by fire, before delivery, he is liable not only for damages, but to refund the payments made to him.

If this be law, it is conclusive of our case.

These authorities conclusively establish the principle that where a man contracts to do every thing requisite to the building of a house according to a certain plan, and to the fitting of it for use and occupation, he is bound to perform his contract if it be possible to do so, and he becomes an insurer against inevitable accidents, as he might have guarded himself if he choose to do so, by requiring such accidents to be excepted in the contract.

That the Plaintiff could and ought to have delivered this building fit for use and occupation, is proved by the fact that Mr. Neirnsee did afterwards make it fit for use and occupation, when the Plaintiff gave it up as a hopeless case, because of his want of skill in his business.

He failed to bore the foundations sufficiently before he built, and when his walls sunk, and he saw the marsh mud on which they were erected, he should have widened or spread the pressure by the use of logs and flag-stones, as was done by Mr. Neirnsee to distribute the weight or float the walls, as it might be termed, on this substratum of soft earth.

Defendant's prayer No 3, p. 34, claims that if the jury find that the work, &c. was done under the written contract, and that none of said buildings were delivered fit for use and occupation at the times stated in said contract, but long afterwards, then the Defendant is entitled to recoupe from the Plaintiff's claim, so far as it accrued under said written contract, such loss of rents, unless the jury shall find that Miss Dermott required alterations which delayed the work, and in consideration of such delays, stipulated with the Plaintiff that he should have an extension of time, and if such extension was made, but no day limited for the completion of the work as extended, then the Plaintiff was bound to complete said work in a reasonable time, and if he did not, the Defendant can recoupe the loss of rents incurred by the Plaintiff's not completing his work in a reasonable time.

This prayer ought to have been granted, as there was evidence to establish the damages claimed in the notice of recoupement.

Record No. 2, p. 30.

And the Defendant also gave proof to show that the whole of the work, &c. now claimed was done under the written contract, except that portion which is described in the bill of particulars for extra work ($1136.23½ Record No. 1, p. 19) as will distinctly appear in

Record No. 2, p. 30—31.

That the time stipulated was a condition precedent is established by the decision of this case in

23 Howard, p. 220.

That we have the right to recoupe these rents, and other damages under the notice given, is established by authority

2 Parsons Cont. 246.

4 Sandf. 147.

11 Howard, 475

16 Wendell, 586.

2 Smith's Leading Cases, 49, 50, 52.

13 Md. Rep. 314.

Tompkins *vs.* Dudley, 11 E. P. Smith, p.

This written contract is to be taken distributively in fixing the damages sustained by not completing the several portions as under it, and the Defendant can claim the loss of rents arising from the non-delivery of the three stores and warehouse, on the 1 October, 1851, and from the non delivery of the residue of building on 1 Dec. 1851.

2 Smith's Leading Cases, 45.

2 Parsons Cont. 29, 30 note.

The Court refused to grant this prayer No. 3, without attaching the qualification (p. 34–5) which leaves to the jury the privilege of ignoring the prayer, if they find that the Plaintiff could and would have completed his work, as stipulated, except for the sinking of the foundations, &c.

We will insist that this qualification was grossly erroneous, and ought not to have been attached.

Defendant's prayer No. 4 (p. 35) raises the right of the Plaintiff to recover under the election made by him, and under the obligations of his contract more than the $5000 payable on 1 Oct. 1851, and the value of his extra work, provided the jury can separate said extra work from the work done in pursuance of the contract.

This prayer should have been granted, as the rule is to adhere to the contract price and to all its terms, as far as they have not been abandoned by the parties, and can be traced or distinguished on the evidence.

1 M. & Rob. 219 and 60.

2 Smith's Leading Cases, by Hare & Wallace, 42.

11 B. Monroe, 167.

1 Parsons Cont. 542.

Although where the sealed contract has been varied, the recovery is to be on *quantum meruit*, yet the contract price still regulates the recovery, if the execution of the contract can be traced.

Pippin *vs.* Burland, Peake's Cas. 103.
Chitty Cont. 566, and notes.
4 Wend. 285.
7 " 121.
16 " 586.
5 M. & W. 241.

In 1 Campbell, 38, where the Plaintiff's claim was for rebuilding a wall, which was out of perpendicular and in danger of falling, "that the claim shall be co-extensive with the benefit.—If the wall will not stand and must be taken down, the Defendant has derived no benefit—but if it will now cost him less to rebuild the wall than it would have done without these materials, he has some benefit, and must pay some damages."

In 8 M. & W. 871, the rule is stated to be that the Defendant "may defend himself by showing how much less the subject matter of the action was worth, by reason of the breach of contract, and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of the contract."

To same effect see
16 Illinois, 495.
16 Ark. 97.

Defendant's prayer No. 5 (p. 35) should have been granted, if the Court were right on our sixth Exception, (p. 31) in admitting Walker's evidence. If he was a copartner of the Plaintiff for one purpose, as decided in that exception, he was for all purposes, and should have been joined in the action as claimed in prayer No. 5.

Defendant's prayer No. 6, was considered by us, under our review of the qualification attached to Defendant's prayers Nos. 2 and 8, as the same principle is involved.

Defendant's prayer No. 7, necessarily results from our preceding prayers, if they are found to be correct, and it was offered to repel the effect of the testimony of the Plaintiff, who went behind the sealed contract to show that Miss Dermott had long before this contract, cherished the plan of such a building, &c. (page 38) and to show that Miss Dermott's architect prepared the plans and specifications (p. 40.) All antecedent parol matter is excluded by the sealed contract.

Chitty on Contracts, ~~95—104.~~

Defendant's prayer No. 9 was justified in its first branch by the principle stated in prayer No. 7 above.

The second branch was correctly intended to relieve Miss Dermott from the effect of Harkness' evidence, that she had before

the delivery of the three stores and warehouse, acknowledged her liability under the contract to pay the $5,000 due on their completion, (see p. 40.)

See cases cited in

1 Md. Dig. 190, § 11, 13.

The tenth prayer of Defendant (p. 36) concedes that if the Plaintiff is not bound by his recorded election, but can recover for his work on the entire building, then the unpaid contract price is to limit his recovery, and that from such unpaid contract price the Defendant has a right to recoupe his loss of rents and damages, provided the jury find the work was done under the written contract, except the extra work, and that it can be distinguished.

We consider this prayer as only involving the principles already discussed under the preceding prayers; and it should have been granted, unless rejected because of its equivalent having been already granted.

The eleventh prayer of Defendant (p. 37) assumes that if the Plaintiff performed his work under the written contract, and voluntarily abandoned its execution before the buildings were fit for use and occupation, and that Miss Dermott did not waive the requirements of the contract in respect to said buildings being fit for use and occupation, and did not accept the work as a fulfilment of said contract in said particular, then the Plaintiff is only entitled to recover in this action for the extra work done not under the contract.

The principle of this prayer is that the Plaintiff cannot recover under the written contract, without showing its full performance, as a condition precedent, as shewn in the previous part of this brief, and so far as his right to recover in that event, as upon a *quantum meruit*, there was no evidence of Miss Dermott's acceptance of the work, so as to subject her to such a claim by a party who had repudiated his contract, and left her land encumbered by such a nuisance as this house was at the time. In such a case we maintain on authority, there can be no claim either on the special contract or an implied contract. See fully on this the following authorities:

9 B. & C. 92.

2 Smith's Leading Cases, by Hare & Wallace, p. 29 and 44.

23 Howard, 233.

Monro *vs.* Butt, 8 Ellis & Blackburn Rep. (92 Eng. Com. Law) p. 752.

19 Pick. 528.

2 Mass. R. 147.

14 Barb. 176.
13 Md. 324—330.
1 McCord Rep. 22.
7 H. & J. 345—363.
1 Gill, 311
5 Md. R. 121.
9 Pick. 298.

The 12th prayer (p. 37) merely raises the question whether under a contract like this, the contract price is to be lost sight of, merely because the parties have agreed to alter some of the work, without stipulating for a change of price. We think the contract price is to govern in such a case.

1 Parsons Cont. 541.

All of which is respectfully submitted.

J. P. POE,
R. J. BRENT,
For Plaintiffs in Error.

APPENDIX.

Contract between Z. Jones and Ann R. Dermott, dated 22d April, 1851, as found in Record No. 2, page 43, &c., excluding the specifications there set forth at large.

THE articles of agreement made on the twenty-second day of April, in the year one thousand eight hundred and fifty-one, between Zepheniah Jones, of the city of Washington, mason and house-builder, of the one part, and Ann R. Dermott, of the same city, of the other part, witnesseth, that the said parties have mutually covenated and agreed, and by these presents do mutually covenant and agree together, each with the other, in manner and form following—that is to say, that he, the said Jones, shall and will well and faithfully do, perform and execute in good, substantial and workmanlike manner, and in a neat style of finish, such as is proper to the sort and kind of work in its various details, all and singular the houses, buildings, and work of every sort and kind described and specified in the schedule hereto annexed and marked A, and which, together with all its appendages and details, is to be taken and regarded as part and parcel of these articles of agreement, being authenticated by the signatures of the said parties, and the attestations of the same witnesses as these present, comprehending all the work and labor of every sort necessary and proper for the pulling down and removal of the houses and buildings standing, or lately standing, on the lot referred to in the said schedule, and for the removal and clearing off all the old materials and rubbish, and for the rebuilding and completion of the new houses and buildings to be erected on said lot according to the specifications of said schedule.

That he shall and will also procure and supply, or cause to be supplied and procured, all and singular the materials, implements, fixtures, matters and things requisite and proper for the execution of the said work in all its parts and details, and for the complete finish and fitting for use and occupation of all the houses and

buildings, and the several apartments of the houses and buildings, to be erected pursuant to the plan of the works described and specified in the said schedule; that the said work and works, and the several parcels and parts thereof, shall be executed, finished, and ready for use and occupation, and be delivered over so finished and ready, to the said Ann R. Dermott, at the time and times following—that is to say, the three stores described in said schedule, as fronting on market space, and the warehouse on 7th street, on or before the first day of October next, and all the residue of the said work on the first day of December next, and that he shall and will forthwith prosecute and carry on the said works with all diligence and practicable expedition.

That the said Ann R. Dermott, in consideration of the covenants and agreements on the part and behalf of the said Jones to be performed and executed as aforesaid, and of the due performance and execution of the same, and in full payment and satisfaction for all the work and labor aforesaid, and for all the materials, implements, fixtures, &c., to be by him procured and supplied as aforesaid, shall well and truly pay him the full and just sum of twenty-four thousand dollars, by the instalments and at the time and times following—that is to say, five thousand dollars on the first day of July next; the further sum of five thousand dollars on the first day of October next; the said stores and warehouse being then finished and ready for use and occupation, and delivered over as above mentioned and agreed on, and the residue of the said sum of twenty-four thousand dollars, to wit, fourteen thousand dollars on the first day of January, A. D. 1860, with interest as follows: that is to say, four thousand dollars, part thereof shall bear interest from the first day of May next, and the residue from and after the complete execution, finish and delivery of the said work on the first day of December next; and all such interest shall be paid quarter-yearly—that is to say, one-fourth part of the yearly interest shall be paid at the expiration of every quarter of a year from and after the time when the same shall begin to run; that on the complete execution, finish, and delivery of the said work on the first day of December next as aforesaid, she, the said Ann R. Dermott, shall give her bond to the said Jones for the due payment of the said sum of fourteen thousand dollars, payable on the said first day of January, in the year 1860, and the interest payable as aforesaid, and shall also give collateral security for the same in and by a deed of trust upon the property on which he has agreed to execute the works specified in said schedule, in which deed there shall be inserted among the other matters usual and proper in such instruments, a clause empowering and requiring the trustee in such

deed named to collect and receive from any tenant or tenants of the said premises every such portion or instalment of said interest as shall be and remain unpaid and in arrear for the space of twenty days after demand and refusal of the same; and as a still further security for the said sum of money and interest, that the same shall constitute and remain a good and valid lien on all the said property, according to the provisions of the act of Congress in such case provided; but no such lien shall exist, or be or inure to the benefit of any person or persons whatsoever other than said Jones, his executors or administrators, under any pretence of work or labor done or materials supplied by his procurement for the execution of his contract and agreement aforesaid, and he shall make all his contracts for such work, labor and materials, on his own individual and personal account and credit, and so as to forefend all claims on the part of any person but himself to any lien or liens on said property.

In witness whereof, the parties aforesaid have hereto set their hands and seals the day and year aforesaid.

ZEPHENIAH JONES, [SEAL.]
ANNE R. DERMOTT. [SEAL.]

Witness—
WALTER JONES,
JOHN C. HARKNESS.

1399

In the Supreme Court.

INGLE, Executor of Dermott,

vs.

ZEPHENIAH JONES.

No. 177.—Dec. Term, 1863.

H. POLKINHORN, PRINTER, 375 AND 377 D STREET, WASHINGTON.

1601

IN THE SUPREME COURT.

INGLE, EXECUTOR OF DERMOTT,
vs.
ZEPHENIAH JONES.
} No. 177.—Dec. T., 1863.

This cause has been before this Court once, and will be found reported in 23d How., 220.

The mandate from this Court was filed in the Circuit Court at the January Term, 1860. At the same term an amended declaration was filed by the plaintiff, Jones, (Record, p. 4,) in the common form of an action of debt for work and labor and materials; and for money paid, laid out and expended, and for money had received; laying his damages at $40,000. At the May Term he filed his bill of particulars, (pp. 5 to 15) which was in substance the cost of the whole building he had agreed to build for Miss Dermott. At the same term the defendant filed her bill of items, which she claimed to "discount or recoupe" from any cause of action he might establish against her, (pp. 15, 16); and also a plea of *non-assumpsit*. At the October Term the death of Miss Dermot was suggested, and summons issued against John P. Ingle, her Executor, who appeared at the January Term, 1861, and the cause was continued to May Term, 1861. By consent the cause was continued to October Term, 1861, when, on motion of the plaintiff, the Court ordered that unless the defendant should by 10 o'clock of the next day file an issuable plea, a plea to the merits of said cause, the Clerk should enter judgment by default, and the plaintiff have an inquisition to assess his damages. (p. 24.)

It appears from the same page and page 23, that the defendant had on the 8th of May, 1860, moved the Court to strike out the said amended declaration and bill of particulars filed herein on the 2d April, 1860, and the Court denied the motion. This refusal by the Court and the order to plead, constitute the ground of the first exception. (p. 23.)

The defendant, Ingle, submitting to the order of the Court to plead. withdrew his plea of non-assumpsit and filed the general issue in debt. (p. 17.) A jury was empannelled and sworn, and returned a verdict for the plaintiff, assessing his damages at $22,149, with interest on $20,137 from the 5th April, 1852.

A general judgment for assets having been rendered on the verdict, (p. 18,) the cause was referred to the Auditor to ascertain for what specific sum judgment should be rendered, (20,) and at January Term, 1862, judgment was rendered on Auditor's Report for $127.12-100 costs of suit, (there being no assets applicable to said debt) and for such further sum as the Court should assess on discovery of further assets. (p. 23.)

On the trial of the cause the plaintiff in error filed seven bills of exception.

The first (pp. 23, 24,) is that this cause being called for trial, and before the jury was sworn in, or the issue joined, the Court, on the motion of the plaintiff, having on the 14th Nov., 1861, overruled the motion heretofore filed by the defendant at May Term, 1860, (for which see supra,) at the same time ordered the defendant to plead by 10 o'clock, A. M., on Tuesday, the 15th Nov., 1861, to the amended declaaation, and thereupon the defendent excepts.

The substance of the second bill is that—

After the plaintiff, Jones, had given evidence by a witness, Harkness, that he knew Jones had done all the work and furnished all the materials for a building consisting of three stores a warehouse and hotel at the corner of 7th street and market space, he offered to prove further by the same wit

ness that the measurement and valuation in the bill of particulars filed were made by him. To this the defendant objected because the plaintiff is estopped by the election heretofore made and of record in this cause from claiming more than the value of the work done and materials furnished in and about the three stores and warehouse described in the said election, (p. 54) and the Court overruled the objection. (p. 24.)

The 3d bill:

Harkness then proved the bill of particulars, and in reply to a question put by the defendant, *said the work was begun under a written contract*, and the defendant required the plaintiff to produce the written contract, or account for its absence, before any further testimony should be given on plaintiff's claim. The Court overruled the objection. (pp. 24, 25.)

The 4th bill:

Harkness then proceeded to prove that the work was done, and was worth $39,864 28, and after it was done the said A. R. Dermott occupied the buildings, and the plaintiff then rested his case.

The defendant then produced to Harkness the written contract of 22d April, 1851, and proposed, on *cross-examination* of Harkness, to ask him if he did not witness that contract, and whether that was not the contract under which said work was begun, and accompanied said enquiry with an offer to read said contract to the jury, and to prove that the said work was done. The Court refused this *on cross-examination*, and required the defendant to postpone his inquiry, and to produce and prove the contract as part of his evidence in chief. (p. 25.)

The 5th bill—

Is to the same effect, the defendant seeking on the cross-examination of Harkness to introduce evidence in chief for himself.

6th exception:

After much evidence detailed as given by the plaintiff and defendant respectively, from p. 26 to p. 31, and the defendant had closed his case, the plaintiff, (p. 31) "by way of rebuttal, gave evidence by Jonathan T. Walker," &c., and "offered to prove by said Walker that he was at first employed" (on said work) "as superintendent for plaintiff. After the work was begun he became a partner with the said plaintiff in furnishing materials and labor in and about the said buildings," &c., "and accompanied said offered evidence with further evidence by said witness to show that the said A. R. Dermott knew of the said co-partnership from its commencement, and frequently told the witness that the other alterations must be made," (he having already testified to various alterations made by her order) "if they delayed the work beyond the stipulated time for its delivery, and she would take no advantage of such delay; and with further proof to show that said witness, long ago, before this suit was brought, sold out all his interest in said co-partnership to the plaintiff. The defendant objected to said offered evidence, but the Court allowed the same to be given.

7th bill:

This exception relates to and covers the several prayers to the Court for instructions to the jury as to the law applicable to the facts of the case.

They are 12 in number, and extend from page 30 to 37. It will be seen (p. 32) that the Court granted prayers No. 1, 2, 3, and 8, with the qualifications annexed to them. No. 9 was given as prayed, and the rest were rejected.

In order, however, to a right appreciation of the law, as declared to the jury, it is proper to present to this Court, in a condensed form, the substance of the facts as they appear in this record.

On the 22d of April, 1851, the defendant in error, Jones, entered into a contract under seal with Miss Anne Dermott by which he agreed to perform well and faithfully all the

work and labor described and specified in certain *plans and specifications* made part of the contract, necessary for the pulling down and removal of certain buildings, and for the erection on the same premises of certain new buildings; and he also agreed to supply all materials requisite for the finish and completion for use and occupation of such new buildings, and that he would deliver finished and ready for use and occupation a portion of the buildings on the 1st of October, 1851, and the residue on the 1st of Dec., 1851.

In consideration of the execution of the agreement of Jones, Miss Dermott agreed to pay $5,000 on the 1st of July, 1851, $5,000 on the 1st of October, 1851, and the balance ($14,000) on the 1st of January, 1860, with interest, payable quarter-yearly, for which residue and interest she was to give her bond, payable on the 1st of January, 1860, secured by a deed of trust on the premises; in which deed there was to be inserted a clause requiring the trustee to collect for Jones' benefit from the tenants of the premises any instalment of interest which should be in arrear for twenty days.

The contract was drawn with great precision, and before its execution, the plans and specifications, the latter going into the minutest details, were prepared by Miss Dermott's architect and superintendent, who throughout superintended and approved the work and materials in conformity with the contract plans and specifications. Under the direction of said architect and superintendent employed by her, the earth foundations were dug out in exact conformity with the specifications, and were fully tested and approved by him and Miss Dermott. (p. 41.)

The portion of the building agreed to be completed on the 1st of October was not then finished, and the $5,000 then due has not been paid; nor were the buildings entirely completed, as agreed, on the 1st of December, nor until about the 5th of April following, when they were accepted and taken possession of by her, but left unoccupied and in an un-

protected state until July, 1852. The delay in the completion gives rise to her claim for rents alleged to have been lost.

Jones, however, gave evidence showing that he could and would have completed the buildings at the times agreed on had he been let alone, and that the delay was owing exclusively to her wrongful interference and intermeddling, and insisting on his making alterations from time to time in the plan of buildings, and to her failure to select the marble mantles mentioned in the specifications; to introduce the gas-pipes, and obtain the permission of the corporate authorities of the city to extend the front steps beyond the lawfully established line. And he showed that the effect of such interference and omissions was to throw the work upon his hands at a much less favorable season of the year than the contract contemplated, thereby causing him much additional expense. (pp. 39, 40.)

Before the buildings were delivered, they were carefully examined by the architect and superintendent of Miss Dermott, and found complete and perfect in all respects, except that, owing to the inherent defect of the ground, one of the walls had sunk about four inches. This wall had previously sunk, but had been reconstructed by Jones, upon the assurance of the architect and superintendent that he should be paid. (p. 41.) Three months after the surrender and acceptance of the buildings, Miss Dermott employed certain persons to repair the injuries the buildings had received from the settling, as well as to make extensive alterations in them. (pp. 27, 42.)

After the building had been completed and delivered to Miss Dermott, Jones demanded payment and settlement according to the terms of his contract, and she refused. He then brought this suit to recover the $5,000 cash payment which he claimed was to have been made on the completion of the stores, and a further sum for additional work on the buildings. And shortly after, filed his bill in equity to com-

pel her to execute the deed of trust stipulated for in the contract. She resisted both.

The common law suit suit was proceeded in to judgment brought by writ of error to this Court, and remanded for a new trial. In the Court below, all the former pleadings were put at an end; a new declaration was filed covering the demand of Jones for compensation for work and labor done and material furnished to defendant, at her request, as though no contract had ever been made. On the trial it was agreed (p. 42) that all antecedent proceedings as appearing in the record, taken up by the first writ of error, may be read from the printed record, &c.

The contract and specifications will be found in that record. (pp. 43, 63.)

With this brief outline of the case, the Court will perceive the application of the several prayers already stated to have been granted by the Court, which were in substance, as follows:

First. That if the work and materials claimed were done and furnished under that contract, (except as to the extra work,) and they could be traced, then the jury are bound to allow the plaintiff the stipulated price named in the contract, *as far as the same was due at the bringing of this suit,* and for the extra work whatever it was reasonably worth, which was qualified by the Court, as follows: That if the jury shall find that certain portions of the work and materials were done and furnished at an increased cost at a later period of the year than the contract and specifications contemplated, and that this delay was caused *solely* by Miss Dermott, such increased cost might be added to the price stipulated in the contract, and the burthen of proof was on the plaintiff to show such increased cost. 1st prayer, pp. 32 and 33.

Second. If the jury further find that the work done in pursuance of said contract was done in such manner that the buildings, when surrendered, were worthless and unfit

for use and occupation, and the said Anne was forced to incur an expense of $10,000 in order to render them, or any part of them, fit for use and occupation, according to the plan of said contract, the defendant is entitled to recoupe the amount of such expense, so far as it can be traced, from the contract price; which the Court granted, with the following qualifications: unless the jury shall find that the said defects existing in the building arose exclusively from the foundation thereof; and the jury are limited in the allowance for said reparations to necessary repairs at the time the building was surrendered, and they cannot be extended to such as arose from her negligence and delay in having the work done. (2d and 8th prayers, pp. 33, 34.)

Third. If the jury shall find the work and the materials charged for were done and furnished under the contract, and none of the buildings were finished and delivered fit for use and occupation at the times stated in the contract, but long afterwards, then the defendant is entitled to recoupe such loss of rents as she had sustained by the non-delivery of the buildings, or any part thereof, unless she required alterations to be made, which delayed the completion of the work: and unless they find she *stipulated* in consideration of such alterations, that Jones should have an extension of time: and if there was no limitation of time to such extension, Jones was bound to complete the work in a reasonable time after the dates limited in the contract, and if he did not complete them in a reasonable time, she is entitled to recoupe such loss of rents:—which the Court qualified as follows:

If the jury shall find that Jones *could* and *would* have finished the stores and warehouse, on or before the 1st Oct., and the whole building, on or before the 1st December, 1851, *except so far as any defects resulting thereto from the sinking of the foundations*, but was prevented from doing so by the acts and interference of the defendant during the progress of the work, and that the plaintiff did in good faith diligently

work and complete the stores, warehouse and buildings, respectively, as soon as he reasonably could and without delay delivered the same to the defendant, in good and tenantable order, (except so far as they were injured by the sinking of the foundation and the walls connected therewith,) then the defendant is not entitled to deduct in this action any loss of rents, or any costs of reparation which she may have paid in repairing or reconstructing so much of the said building as was so injured by the sinking of said foundation and the portion of the building dependent thereon.

It is submitted that the prayers as qualified correctly stated the law of the case. If there was error in them it certainly was not to the injury of the defendant below.

The qualifications of the Court involve three propositions of law

First. That where there is a contract for work and materials, and owing exclusively to the wrongful interference and delays of the employer, the workman is obliged to go on and furnish the work and materials at a less favorable season, and at an increase of expense beyond what was contemplated by the contract, the workman is entitled to add such increase to the contract price, but the burden of proof is upon him.

Second. That where a workman enters into a contract to do work and furnish materials for the erection of a building on the land of another, *according to certain plans and specifications*, and acting under the superintendence of an architect appointed by his employer, he is not responsible for inherent and latent defects in the earth upon which the building is to be erected, if he adheres to the plans and specifications, and especially where the earth is approved by the architect.

Third. Where an employer is entitled to recoupe for defects in work and materials, he is confined to necessary repairs at the time he received the work and materials, or within a reasonable time afterwards. He cannot recover for his own negligence in repairing.

Subject to these elementary propositions the Court ruled.

1. That the contract established *the measure of damages,* and *also the mode of payment ;* that the plaintiff could neither recover *more than the contract price, nor any portion than what had become due.*

2. That the defendant was entitled to recoupe all damages, including loss of rents, sustained by reason of defects in the work or materials, or by reason of delay on the part of the defendant in the execution of his undertaking.

It is not easy to conceive, what more the defendant could ask. He prayed however.

First. Defendant's 4th prayer, (p. 35.)

That if the plaintiff's claims were under the written contract, and for certain other work, he can recover only the value of such extra work, and the sum of $5,000 payable by the contract on the 1st October.

Second. Defendant's 5th prayer, (p. 35.)

If the claim does not arise under the written contract, or the contract was abandoned by the parties, and when a portion of the work was done &c., the witness Walker, *was to the knowledge of the said* A. R. Dermott, a co-partner with the plaintiff, in executing the said portion of the work, then the plaintiff cannot recover.

Third. Defendant's 6th prayer, (pp. 35, 36.)

That the plaintiff by said contract was bound to supply and procure every material, implement, fixture, matters and things, requisite and proper for the execution of said work, in all its parts and details, and for the complete finish, and fitting for use and occupation &c., but if the buildings were not fitted for use and occupation, by reason of the sinking of some parts of the walls thereof, *owing to defects in the substratum of earth on which said buildings were erected &c.,* the defendant is entitled to recoupe such part of the damages claimed in the notice of recoupement, as was sustained by his default, if the jury find it *was possible* for the

plaintiff, to have erected said buildings according to the contract.

Fourth. Defendant's 7th prayer, (p. 36.)

If the work was done under the contract, the plaintiff cannot charge defendant with the delays, and additional cost caused by changes in the plans and specifications.

Fifth. Defendant's 10th prayer, (p. 36.)

If the work was done under the contract, the plaintiff can only recover the unpaid and undue portion of the contract price, and the reasonable value of the extra work, less such sum as the jury shall find, was necessarily expended by the said Anne R., for the purpose of completing the buildings, and also less such damages in the loss of rents, as she has sustained by reason of the negligence or default of the plaintiff, in executing said work.

Sixth. Defendant's 11th prayer, (p. 37.)

If the work was done under the contract, and the plaintiff voluntarily abandoned the execution of the contract before the buildings were completed, and the defendant did not waive the full performance of the contract in respect to the completion of the buildings, and *did not accept the work as done* by the plaintiff as a fulfillment of the contract, the plaintiff is not entitled to recover any thing but for the extra work.

Seventh. Defendant's 12th prayer, (p. 37.)

If the alterations were made by mutual consent, that is not sufficient cause for changing the stipulated price, unless the jury should find further, that at the time of such alterations there was a stipulation between the parties in regard to a change in the contract price.

Before proceeding to discuss the questions of law to which the prayers give rise, there are certain preliminary objections to be disposed of.

The first exception is to the refusal of the court, on motion of defendant, to strike out the amended declaration and bill of particulars.

It is submitted this is answered by the decision of this Court in the former writ of error. 23 How., 220.

The same exception embraces another ruling of the Court, ordering defendant to plead an issuable plea by 10 o'clock next day.

This is answered by the Act of Assembly—Kilty's laws of Maryland, 1785, ch. 80, § 5.4

The second exception is to evidence touching any portion of the work and materials claimed for, except as to the three stores and warehouses on the ground that the plaintiff was estopped by his election theretofore made, to sue for $5,000 only, and the extra work.

The answer is, that the election was made when the plaintiff was suing in this action on the special contract. It having been decided, he could not recover under that special contract, and he having abandoned all claim under it—having amended his case, and seeking to recover in this action what he was justly entitled to for work and materials which the defendant had accepted and was enjoying, the election being an incident to the counts on the special contract, was dissolved when the claim under the contract was abandoned. *

As to the third exception, it lay in the sound discretion of the Court to order the production of the written contract, and its refusal furnishes no ground for this writ of error.

Even if there was error, there was no *injury* to defendant, as her counsel subsequently introduced the writing, and she had the full benefit of it.

The fourth and fifth exceptions turn on the right to introduce, by way of cross examination, evidence in chief for the party cross-examining, and the right of the court to compel him to wait and introduce it at the proper period.

This is answered by the case of Philadephia and Trenton Railroad Co., *vs.* Stimpson, 14 Pet. R., 461. 1 Black 226

The sixth exception involves two questions.—First: whether by way of rebutting proof, and after the defendant had introduced evidence to show the work had been delayed, the

* Wright v. Hollingsworth 1 Feb. 67-8.

plaintiff could show that the delay had been caused by the defendant herself, and with the express declaration on her part, "*that she would take no advantage of the delay.*"

To this, the answer is, no rule of law has been shown to exc'ude such proof; and common honesty requires its admission.

Second:—That the witness had, at one time time, during the progress of the work, been a partner in that work, and was known by the defendant as such partner; but was not so when the work was begun at her request, nor when it was completed, but had sold out his interest, and had no interest in the event of the suit.

It is difficult to conceive a rational objection to this. He had no interest when the work was begun, and he had no contract with her at any time. The implication arising from the fact that she knew he had an interest while some portion of the work was being done, does not create a contract between them, express or implied, because Jones was the only person to whom she looked for the work, and gave her authority or request for doing it. It is the *request* which gives rise to the implied promise. Chitty on Contracts, 590, 591.

And as the witness had no interest in the event of the suit, he is competent to show what she said and did as to Jones, while she was looking to him alone for the execution of the work, and as she knew the witness was interested in the work, what she said to him was said to Jones.

Proceeding now with the questions of law arising on the prayers as qualified and given, and those refused.

The plaintiff having done work and furnished materials under a special agreement, but failing to deliver at the times prescribed, and such delivery having been determined by this Court to be a condition precedent to any recovery under the special contract, was compelled to resort to a general indebitatus assumpsit:

"The law implies that the work and materials are to be paid for." 23, How., 233.

"The law implies a promise to pay such remuneration as the benefit conferred is really worth, and the right to recover it in an action of indebitatus assumsit is maintainable. Ib., 234."

POINTS.

I. The qualification of the defendant's first prayer was right. The Court ruled that the contract was the rule as to the price *and time of payment.*

The qualification was that if owing to the fault of the defendant portions of the work were done at an increase of cost beyond what the contract stipulated, such increase might be added to the stipulated price.

Such is the rule laid down by Mr. Sedgwick in his work on Damages, 3d ed., p. 222.

Koon *vs.* Greenman, 7 Wend., 285; Dubois *vs.* Delaware and Hudson Canal Co., 4 Wend., 285, S. C., 12, Wend., 334 and S. C. in error, 15, Wend., 87; Aiken *vs.* Bloodgood, 12 Alabama, 221; Merrill *vs.* Ithaca, and Oswego Railroad Co., 15 Wend, 586.

In principle, it is impossible to distinguish between work done at an increased cost, owing to no fault of plaintiff, and extra work. Both are for what is beyond the demands of the contract.

For the evidence to support the qualification, see record, pp. 39 and 40.

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II. There was no error in the qualification of the 2d and 8th prayers, to the effect that the defendant recouping for defects in work and materials was confined to such sum as was necessary to repair such defects, and could not claim for any damages resulting, not from the fault of plaintiff, but from her own negligence and unreasonable delay in making repairs.

A proposition so elementary needs no authority. It is simply that the plaintiff should not be saddled with the sins of defendant. (Record, pp. 27, 42.)

III. The Court was right in ruling that the plaintiff was not responsible for damages, whether for repairs or loss of rents, resulting exclusively from inherent defects in the earth upon which said buildings were erected. This is substantially the proposition presented by the other qualification of the 2d and 8th prayers, and by the qualification of the 3d prayer.

The general principle is plain. In all cases of *locatio operis faciendi* where a workman undertakes to incorporate his work and materials with the property of another, and loss is sustained in consequence of some inherent defect in the property, the loss falls upon the employer. The maxim of *res perit domino* applies.

"If the work is doing on a thing belonging to the employer, or after it is finished, but before it is delivered to the employer, the thing perishes by internal defect, by inev-

itable accident, or by irresistable force, without any default of the workmen, Pothier holds that the latter is entitled to compensation to the extent of the work done on it, unless his contract import a different obligation." (Story on Bailments, S. 426.) Such was also the doctrine of the Roman law, and was applied to the case of a house accidentally thrown down by an earthquake while building. (Id.)

It is also the Scotch law. If the workman is employed in working up the materials or adding his labor to the property of the employer, the risk is with the owner of the thing with which the labor is incorporated. (1, Bell's Comm. p. 456, 5th ed.) The employer is the guarantor of the thing upon which the work and materials of the workman are to be expended by the code of France: and the code of Louisiana adopts the same rule. (Story on Bailments, S. 426.)

And the common of law is the same (Id. S. 426) and cases cited.

"If the loss in bad execution is not properly attributable to the *fault* or *unskillfulness* of the undertaker, or those employed by him, but arises from the inherent defect of the thing itself, in such a case the loss is to be borne by the employer, unless there is some agreement by which the risk is taken by the undertaker. The Roman law fully recognized the same doctrine, and applied it to the case where a gem, in being set, was broken from some intrinsic defect. Si gemma, &c." (Ib. S; 428 *a*. 2 Kent's Comm., Lect. 40. p. 588, &c., 4th Ed.)

Such was the rule applied by the Court below, holding the plaintiff responsible for all damages occasioned by his negligence or want of skill, but exonerating him from liability for inherent defects in the defendant's property.

For the defendant however, it was contended that the plaintiff, was not only bound to answer in damages by way of recoupement, for the consequences of a want of proper skill and negligence, but was absolutely responsible for all damages occasioned the defendant, by reason of the non-

delivery of the buildings fit for use and occupation at the prescribed times, whether such damages were attributable to the default of the plaintiff, the inherent defects of the earth, or any other cause whatsoever. In other words it was argued that the plaintiff was a *guarantor* or *insurer* of against defects in defendant's property and all causes whatsoever, whereby the buildings might not be ready for use and occupation, at the the times fixed. This Court will not fail to see that such is the theory of the 2d, 3d, 6th, 7th, 8th, 10th, and 11th prayers.

Undoubtedly the plaintiff *might* have assumed the extraordinary resposibility alleged, but unless it be clearly shown that he did so, the presumption is that he contracted for no more than the sort and degree of skill and diligence belonging to his trade.

Did the plaintiff, then contract to *insure* the property of the dependent as alleged?

His stipulations in the contract are two: one relating to the work, the other to the materials.

The former provides that he "shall and will *well and faithfully* do perform and execute in good substantial, and workmanlike manner, and in a neat style of finish, such as is proper to the sort and kind of work in its various details, all and singular the houses, buildings and work of every sort and kind *described and specified in the schedule hereto annexed marked* A, (the specifications) *which together with all its appendages and details, is to be taken as part and parcel of these articles of agreement*, being authenticated by the signatures of the said parties and the attestations of the said witnesses to these presents; comprehending all the work and labor of every sort necessary and proper for the *pulling down* and *removal* of the houses and buildings standing, or lately standing on the lot referred to in the said schedule, and for the removal and cleaning off all the old materials and rubbish, and *the re-building and completion of the new*

houses and buildings to be erected on said lot, according to the specifications of said schedule."

Is this the language of a party who covenants for anything beyond the skill and diligence belonging to his calling?

He is to do the work *well* and *faithfully, and according to the specifications.* What is this but the provision of every ordinary building contract, and what shadow of pretext is there for asserting that Jones intended to be responsible for any thing more, than the skill and fidelity, appertaining to his work *as marked out by the specifications?*

And so with the other provision relating to the materials: "that he shall and will also procure and supply, or cause to be supplied and procured, all and singular the materials, implements, fixtures, matters and things requisite and proper *for the execution of said work* in all its parts and details, and for the complete finish and fitting for use and occupation of all the houses and buildings and the several apartments of the houses and buildings *to be erected pursuant to the plan of the works described and specified in the said schedule;* that the said work and works, and the several parcels and parts thereof, shall be executed, finished, and ready for use and occupation, and be delivered over so finished and ready, to the said Anne R. Dermott, at the time and times following: that is to say, the three stores described in said schedule, as fronting on Market Space, and the warehouse on 7th street, on or before the first day of October next; and all the residue of the said work on the first day of December next; and that he shall and will forthwith prosecute and carry on the said work *with all diligence and practicable expediton.*"

Is this the stipulation of an insurer of anything but his own skill, fidelity and diligence in the prosecution of work undertaken in pursuance of *prescribed specifications and plans?*

It is submitted that the defendant became entitled to, or indeed purchased, by the contract, the skill and diligence of the plaintiff in supplying the work and materials stipulated,

and also to his judgment, so far as involved in the work and materials.

But she never bought his judgment as regarded the plans and specifications. He was never consulted about them, but they were prepared by her architect, and put in his hands to work by.

If he deviated from the plans and specifications, he was guilty of a breach of contract, for which he was responsible. His business was to work by, not to over-ride them.

It is thus apparent that the present case is not one where an engineer, surveyor, or architect employed to furnish plans and specifications, is guilty of neglect, and not exercising that degree of skill and judgment which the employer prays, but where a mechanic is employed to supply work and materials according to plans and specifications which he is bound to follow.

The rule of law is that a party is responsible for the ordinary degree of skill belonging to his trade or profession. But Jones was not an engineer or architect, but a mason and house-builder, and is so described in the articles of agreement.

Nor did the defendant treat with him in any other character than that of a mechanic, competent, not to plan, but to carry out her plans. She "employed an architect and superintendent by whom the plans and specifications were prepared," and who, in her behalf, superintended the work and approved the same. (pp. 40, 41.) "The earth foundations were dug out in according with the requirements of the said specifications, and under the direction of the said architect and superintendent." (Id.)

Her remedy then for any defect in the plans and specifications was against the architect, not Jones. The architect should have ascertained, if necessary, by boring, or otherwise, whether they were practicable.

Moneypenny *vs.* Hartland, 1 C. and P., (12 E. C. L. Rep.,) 352. S. C. in Banc., 354. S. C., 2 C. and P., 378.

Lanphier *vs.* Phipos, 8 C. and P., (34 E. C. L. Rep.,) 475.

It will not be denied that the defendant could only recoupe such damages as she would be entitled to recover in a cross-action. Recoupment involves a more simple remedy, but gives no new right except to the remedy. If the day after the contract was made, or at any time before the completion of the work, the earth foundations had sunk from inherent defect, could the defendant have sued the plaintiff for the damages she thereby sustained?

She could, if he undertook to insure as contended.

If, then, Jones was not answerable for the condition of the defendant's property upon which he agreed to work by prescribed plans and specifications, he was entitled to recover in this action according to the contract price for the benefit conferred, though she was partially deprived of that benefit by causes for which he was not responsible.

Menetone *vs.* Athawes, 3 Barr, 1592.

Gillett *vs.* Mawman, 1 Taunt., 137.

Wilson *vs.* Knott, 3 Humph., 473.

Story on Bailments, S. 426, *a.*

And a *fortiori* where such deprivation was owing to a defect in the earth for which *she was responsible*. *Ib.*, 428 *a.*

1 Parsons on Contracts, 2d ed., 611.

IV. The Court was right in rejecting defendant's fourth prayer—

2. Because it was partial, and ignored the evidence which led to the qualification under the first prayer. (See Point I supra and authorities) If the Court below was right in giving that qualification, this prayer was properly rejected.

2. Because, so far as this prayer asked an instruction that the contract governed the time of payment, that instruction was already given in response to the first prayer—"*and so far as the same was due at the time of bringing this suit.*"

V. The 6th, 7th 10th and 11th prayers were properly rejected because they all contained the vicious element which has been discussed above, in Point III.

They all involved the legal proposition, that the plaintiff was responsible for the inherent defect in the defendant's property.

The 7th prayer is further obnoxious to the objection which induced the qualification of the 1st prayer.

VI. The Court properly rejected the 12th prayer.

It assumed that though by mutual agreement changes were made, shch changes were not sufficient cause for a change of price, in the absence of an express stipulation for increase of price. Such a proposition answers itself. It is plain that whenever a change in work is made by mutual consent, the employer is bound by implication of law, in the absence of any agreement as to price, to pay the reasonable value of the increased benefit.

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In what has been said supra, p. 13, as to the 6th exception taken to the ruling of the Court, in favor of the competency of Walker as a witness, will be found the answer to the 5th prayer of defendant.

It is submitted there is no error in the judgment below and the same ought to be affirmed.

JOS. H. BRADLEY,
W. D. DAVIDGE,
For Defendant in Error